Somerset Welding & Steel, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Cases 6–CA–19922, 6–CA–20034, 6–CA–20096, 6–CA–20250, and 6–RC–9822

August 13, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 22, 1989, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions except as modified below and to adopt the recommended Order as modified.

I. BACKGROUND

The Respondent, which operates three facilities in or near Somerset, Pennsylvania, is engaged in the customized manufacture, installation, and repair of truck bodies, trailers, and truck equipment. There is no history of collective bargaining. A union campaign began at the Respondent's facilities in March 1987, culminating in a May 15, 1987 election. A revised tally of ballots showed 64 votes for the Union, 71 against. Both sides filed objections (the Respondent's have been withdrawn). The campaign gave rise to several allegations that the Respondent had engaged in various unfair labor practices and that, as part of a remedy for these unfair labor practices, a Gissel[2] bargaining order was warranted. The Respondent denied having committed any unfair labor practice.

II. DISCUSSION

A. *The 8(a)(1) Violations*

The judge found, and we agree, that the Respondent committed numerous violations of Section 8(a)(1) of the Act during the campaign. Guy Rush, the Respondent's vice president in charge of production, coercively interrogated employees about union activities and implied to one of them that one of the Respondent's three facilities would be closed if the Union won the election. John Tims Sr., superintendent of one of the Respondent's facilities, coercively interrogated an employee[3] the night before the election, stated that the loss of all benefits or plant closure would follow a union victory, and threatened to fire the employee. Dwight Clyde, plant manager of one of the Respondent's facilities, coercively interrogated an employee about his attitude towards the Union. Clyde told one employee (and was overheard by another) that if the men in the shop knew what was good for them, they would vote against the Union. He threatened several employees, after a captive-audience meeting, by implying, based on isolated evidence, that unionization and its attendant wage increases would make one of the Respondent's facilities unprofitable. Clyde also told a group of five or six employees, during the week before the election, that the Respondent's chairman, Sidney Riggs, was very angry about the Union and would close the plant if the Union won the election. Roger Pyle, a first-line supervisor, stated on at least two occasions that Riggs would close the plant if the Union won. Rod Berkley, another first-line supervisor, told employees that if the Union won wages would be put back to zero, people would probably lose their jobs, union supporters would be disciplined or fired, and the plant would probably close.

B. *The 8(a)(3) Violations*

The judge also found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by denying employee Thomas Deist a promised wage increase, a few days after Deist had attended a union meeting where he signed an authorization card.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily transferring employee Randy Keyser, an active union supporter. In reaching this conclusion, the judge found that ''Keyser was replaced on the hydraulic work at the Trailer plant from which he was transferred by Jack Updyke and Clyde Smith.'' The judge found that the transfer reduced neither Keyser's pay rate nor his benefits, but that during the relevant period after the transfer until Keyser voluntarily quit on August 7, Updyke worked 195 hours, Smith worked 200 hours, and Keyser estimated that he worked 168 hours. The judge found that Keyser was transferred from one time-critical job to another. Stating that ''the issue is not free from doubt,'' the judge concluded that ''Keyser's unprecedented removal from the Trailer department, with the commitant loss of overtime'' violated Section 8(a)(3) and (1) of the Act.

The Respondent excepted to this conclusion. We find merit in the Respondent's exceptions, and we conclude, for the reasons set forth below, that Keyser's

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[3] The employee in question was his son, John Tims Jr.

transfer did not violate Section 8(a)(3) and (1) of the Act.

Our examination of the record persuades us that Keyser was not transferred from a time-critical job at the Trailer plant. Rather, the record references to a ''rush'' job at the Trailer plant pertained to the military trailer project that was completed before Keyser was transferred. Nor do we believe that it is completely accurate to state that Updyke and Smith ''replaced'' Keyser. The record indicates that they were already doing hydraulic work at the Trailer plant before Keyser's transfer. They simply took on more work in his absence. In light of these conclusions, and the judge's concession that the issue was ''not free from doubt,'' we do not believe that the difference between the number of hours worked by Updyke and Smith and the number of hours Keyser estimated he worked is sufficient to justify a finding of a discriminatory transfer. Accordingly, we reverse the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by transferring Keyser.

C. *Conduct of Respondent's Chairman*

Relying on *Harrison Steel Castings*, 293 NLRB 1158 (1989),[4] the judge concluded that Chairman Sidney Riggs' oral and written communications during the campaign violated Section 8(a)(1) of the Act. He found that Riggs violated the Act by associating unionization with loss of jobs and plant closure and that Riggs' references to a bargaining strategy that would allow the process to begin from ''scratch,'' ''zero,'' or ''the minimum wage,'' in the context of other supervisors' coercive statements (especially John Tims Sr.'s statement that if the Union was voted in the company would take away all employee benefits) violated Section 8(a)(1) of the Act.

Riggs held a series of four captive-audience meetings at each facility. He spoke without a prepared text, then answered questions. Riggs discussed local plants, most but not all unionized, that had closed in recent years. Referring to newspaper articles, he attributed the closures partly, but not entirely, to labor problems caused by unions. Because we conclude that the Respondent's other violations form a sufficient basis for a bargaining order, we find it unnecessary to decide whether Riggs' conduct violated Section 8 (a)(1) of the Act.

THE REMEDY

We find that a bargaining order is necessary in this case even assuming that the statements made by Riggs were lawful.[5] The Supreme Court held in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614–615 (1969), that where

> the possibility of easing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

Applying this standard, we find that a bargaining order is warranted here.

The judge found, and we agree, that Vice President in Charge of Production Guy Rush coercively interrogated employees concerning their union activities and threatened plant closure and job loss in the event of a union victory. John Tims Sr., the superintendent of one of the Respondent's facilities, not only coercively interrogated his son, but also threatened to fire him and told him that the loss of all benefits or plant closure would follow unionization. Plant Manager Dwight Clyde coercively interrogated an employee, warned that employees would vote against the union if they knew what was good for them, implied to several employees that unionization would be fatal to the Respondent, and told a group of five or six employees during the last week of the campaign that Riggs was very angry about the Union and would close the plant in the event of a union victory. In addition, Supervisors Roger Pyle and Rod Berkely similarly threatened that Riggs would close the plant if the Union won, and Berkely threatened drastically lower wages, job loss, the disciplining and firing of union supporters, and plant closure.

We have emphasized, with court approval, that threats of plant closure and discharge not only are ''hallmark'' violations but are '''among the most flagrant' of unfair labor practices.'' *Action Auto Stores*, 298 NLRB 875 (1990) (citing *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301–1302 (6th Cir. 1988), enfg. 287 NLRB 796 (1987)).[6] Moreover, the judge found, and we agree, that the Respondent violated Section 8(a)(3) by denying a promised wage increase to employee Thomas Deist because of his union activities. As in *Action Auto* and *Indiana Cal-Pro*, we find that these 8(a)(1) and (3) violations, which threaten the

[4] In *Harrison Steel Castings*, the Board stated that the respondent had ''manifested overt hostility to the union activists in its work force'' and therefore ''could not lawfully go on to suggest the loss of jobs as a result of loss of business to the competition without demonstrating to employees that such a chain of causation would be brought about through forces beyond the Respondent's control.'' Id. at 1159.

[5] The judge found that a bargaining order was necessary in light of all the illegal conduct he had found the Respondent to have engaged in, including Riggs' statements.

[6] The coercive effect of these threats and interrogations is especially great because they were communicated by the Respondent's most senior managers. Cf. *Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987–988 (3d Cir. 1980) (bargaining order justified where violations committed by high ranking managers but no finding of violations by president). We also find that the timing of the Respondent's virulent antiunion campaign, which coincided almost to the day with the advent of the Union on the scene, further heightened its impact on employees. See *Astro Printing Services*, 300 NLRB 1028 (1990) (unfair labor practices commenced on the day the union demanded recognition).

very livelihood of employees, are likely to have a lasting impact which is not easily erased by the mere passage of time or the Board's usual remedies.[7] Accordingly, a bargaining order is necessary to remedy the unfair labor practices which we have found and to effectuate the employees' sentiment, as expressed in the Union's valid card majority, in favor of representation.

Finally, we respectfully disagree with our colleague's reluctance to give the Union's card majority the deference which it is due under our precedent. Of course, we agree with our colleague that elections are the preferred method for determining employee wishes. However, our colleague does not dispute that, as of March 17, 1987, a majority of unit employees had signed valid and unambiguous authorization cards.[8] Under these circumstances, and consistent with the Supreme Court's observation in *Gissel*, ''[w]e cannot agree . . . that employees as a rule are too unsophisticated to be bound by what they sign.'' *Gissel*, above at 607.[9]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Somerset Welding & Steel, Inc., Somerset, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).

''(d) Discouraging employees from engaging in union activity by denying wage increases, or in any other manner discriminating with respect to their wages, hours, or terms and conditions and tenure of employment.''

2. Substitute the following for paragraph 2(b).

''(b) Make whole Thomas Deist for earnings lost by reason of the discrimination against him, with interest, as set forth in the remedy section of this decision.''

3. Substitute the attached notice for that of the administrative law judge.

MEMBER OVIATT, dissenting in part.

My dissent is limited to two issues. Unlike my colleagues, I believe that we should decide whether the preelection conduct of the Respondent's chairman, Sidney Riggs, violated Section 8(a)(1) of the Act. I would find that Riggs' stated intention to bargain from scratch violated the Act. I would also find his statements relating to plant closure unlawful, but only as interpreted by certain of the Respondent's supervisors. I nonetheless dissent from my colleagues' conclusion that a bargaining order is warranted in this case.

As a threshold matter, I agree with the judge's conclusion that, despite the puzzling omission from the four separate unfair labor practice complaints of allegations that Riggs, in April and May 1987, threatened employees with plant closure or job loss in the event of unionization, it was appropriate for the judge to make findings as to this matter. In my view, ''the matter was related to other allegations of the complaint, fully and fairly litigated, and not prejudicial to the Respondent.'' *Northern Wire Corp*., 291 NLRB 727 fn. 1 (1988). I note that the Respondent did not object when this matter was raised at the hearing.

While I believe that much of what Riggs said consisted of accurate factual reports and legitimate efforts during a vigorously contested campaign to persuade the employees as to the likely consequences for the Respondent of unionization, in a few crucial respects he exceeded permissive bounds. Thus, Riggs made statements indicating that if the Union won the election the Respondent would adopt a bargaining strategy that would place all existing benefits on the negotiating table, and allow the process to begin from ''scratch,'' ''zero,'' or ''the minimum wage.'' These statements, in my view, could reasonably have been understood by employees as threats of the loss of existing benefits. I would therefore find them violative of Section 8(a)(1) of the Act.

Riggs also discussed the closure of a number of other local plants, all but one unionized, and admitted telling his employees that ''if we're not careful and we don't learn from what's going on here, that it could happen in Somerset.'' He also informed the employees that the Respondent could afford no more than the current wages and benefits. In my view, the threats of plant closure by the Respondent's other supervisors provided an interpretive gloss on Riggs' statements on the subject. I would find that those employees who heard both Riggs' statements and any of the other supervisors' plant closure statements were threatened in violation of Section 8(a)(1) of the Act. I do not, how-

[7] Our dissenting colleague recognizes the presence of hallmark violations in this case but discounts their significance in part because he contends they were not sufficiently disseminated. However, our colleague acknowledges the role played by Riggs' statements to employees in thoroughly airing the Respondent's views on unionization. Under these circumstances, we find that the impact of the unfair labor practices was sufficiently pervasive that it is unlikely that our usual remedies will erase their effects. Cf. *Action Auto*, above (unfair labor practices at 8 of Respondent's 12 stores sufficient to warrant bargaining order even in absence of finding that knowledge of respondent's actions was disseminated).

[8] In this regard, and pursuant to the General Counsel's request, we correct the two references in the judge's Conclusions of Law to the date ''March 17, 1989'' to read ''March 17, 1987.''

[9] Our dissenting colleague suggests that, as an alternative to a bargaining order, we order Riggs to read the Board's notice aloud to the employees. We regard this asserted alternative as illusory; the cases cited by our colleague reflect the lack of court approval for this remedy. *St. Agnes Medical Center v. NLRB*, 871 F.2d 137 (D.C. Cir. 1989), *NLRB v. Village IX, Inc*., 723 F.2d 1360 (7th Cir. 1983), and *NLRB v. K & K Gourmet Meats*, 640 F.2d 460 (3d Cir. 1981), cited by our colleague, are distinguishable as the unfair labor practices ultimately relied on to support a bargaining order in those cases did not include threats of plant closure or other unfair labor practices as serious as those present in this case. Moreover, the unfair labor practices here are sufficiently severe that only a bargaining order will effectuate the employees' right to freely choose whether to engage in collective bargaining. In this regard, we also disagree with our colleague's suggestion that a Board election should be viewed as a means of remedying unfair labor practices, as these employees have a statutory right to participate in an election free of lingering coercion.

ever, find that Riggs' plant closure statements standing alone were unlawful.

Nor would I affirm the judge's conclusion that a bargaining order is warranted. As an initial matter, I would emphasize the nature of a remedial bargaining order. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) (secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support). In *NLRB v. K & K Gourmet Meats*, 640 F.2d 460, 469–470 (3d Cir. 1981), the court noted that the selection of an exclusive collective-bargaining agent is not a game of chance but a matter of the highest importance to employees and employers alike, and that legislation and experience indicate that an employee's statutory right to select an exclusive bargaining agent should be determined by democratic process in a free and open election. The court stressed that the Board's responsibility for holding such elections was not meant to be supplanted by the authority found to exist in *Gissel* and that only where the extensive machinery and power of the Board are inadequate to ensure a free election, should employees be denied their right to cast a secret ballot for or against an exclusive bargaining agent. The court held that a bargaining order is not a routine remedy and, because it operates to disenfranchise the workers in the choice of their representative, it is appropriate only when the harmful effects of that disenfranchisement are outweighed by the positive advancement of the policies underlying Federal labor law, which are neutral as to the formation of collective-bargaining relationships. The court emphasized that the employees' freedom of association and freedom to select a bargaining agent may be substantially diminished by dependence on authorization cards. See also *United Dairy Farmers Cooperative Assn. v. NLRB*, 633 F.2d 1054, 1067 (3d Cir. 1980) (the Supreme Court has noted the acknowledged superiority of the election process as a method for selecting a majority representative of employees); *NLRB v. Eagle Material Handling*, 558 F.2d 160, 166 (3d Cir. 1977) (selecting bargaining representatives through traditional election processes is a general and highly desirable practice).

I find it troubling that when the Board issues a bargaining order in a ''category two'' *Gissel* situation it may deny the right of a majority of employees to reject the union in a secret ballot election even though a majority may have signed authorization cards. I lean toward reliance on the electoral process to remedy unfair labor practices in part because of my understanding of how card solicitation works. Even without misrepresentation or coercion, cards are often signed without much exposure to the competing arguments that characterize an election campaign. Indeed, it has been my experience that employees often sign cards merely to escape the attentions of the union organizer.

My colleagues point out that this case is not free from violations of Section 8(a)(3) of the Act. Neither, however, does it involve a large number of egregious violations. We have reversed the judge's conclusion that the Respondent discriminatorily transferred employee Randy Keyser. The remaining 8(a)(3) violation is the denial of a wage increase to employee Thomas Deist. While not trivial, this violation is certainly less serious than, for example, a discriminatory discharge. No one lost his job here. Nor does the record before us show that the Respondent has a history of opposition to unionization. Cf. *Hedstrom Co. v. NLRB*, 629 F.2d 305, 312 (3d Cir. 1980).

While I would find that Riggs violated the Act by threatening to bargain from scratch, this is not a ''hallmark'' violation of the type that would normally give rise to a bargaining order. *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980). The plant closure threat is a ''hallmark'' violation, id., but I would find that only those employees who heard Riggs' plant closure statements and the interpretive statements by at least one of the other supervisors were threatened. The record does not demonstrate that the statements (with respect to both plant closure and other subjects) by the other supervisors, all of which were made to small numbers of employees, were disseminated to anyone who did not hear them directly. Thus, in a unit of more than 130 employees, approximately a dozen heard the other supervisors' statements. In my view, the threat here was not communicated to a ''significant percentage of employees in the bargaining unit.'' *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 149 (3d Cir. 1979).

I do not minimize or condone the Respondent's violations of the Act. Indeed, I believe that it would be quite appropriate in this case for the Board to order Chairman Riggs to read the Board's notice to the employees, rather than merely to post it. I do not agree with those courts that have criticized such requirements as humiliating or degrading. *Electrical Workers IUE v. NLRB*, 383 F.2d 230 (D.C. Cir. 1967); *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859 (5th Cir. 1966). Such a requirement would go far toward dissipating the effects of the Respondent's unfair labor practices and clearing the air in preparation for a fair rerun election.[1] But a fair election, not a bargaining order, is the proper medicine here.

[1] The majority, rejecting this alternative as ''illusory,'' states that the cases I cite above ''reflect the lack of court approval for this remedy.'' It is fair to observe, however, that courts have not been uniformly enthusiastic about the bargaining order remedy adopted by the majority. See, e.g., *NLRB v. K & K Gourmet Meats*, supra; *St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 147 (D.C. Cir. 1989) (bargaining order will be enforced only where court can determine (1) that Board gave due consideration to employees' Sec. 7 rights, which are, after all, one of fundamental purposes of the Act, (2) why the

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Board concluded that other purposes must override rights of employees to choose their bargaining representative, and (3) why other remedies, less destructive to employees' rights, are not adequate); *NLRB v. Village IX, Inc*., 723 F.2d 1360, 1370–1371 (7th Cir. 1983) (bargaining order will not, except in most egregious circumstances, be issued as way of punishing employer for committing unfair labor practices unless practices were so serious that employees would be intimidated from voting their true preferences in a new election even if no unfair labor practices were committed in the campaign leading up to that election and even though a new election would be held by secret ballot). I also note that the finding by the judge that the ''cards signed by a majority of the unit employees on or before March 17 furnishes a *more reliable indicia of employee choice* than might be possible through a future election'' (emphasis added) (infra at 41) does not meet the test required by the Supreme Court in *Gissel*. The Court held there, and we and the courts have assiduously attempted to follow the concept, that there must be a finding of fact that, in view of the unfair labor practices, the likelihood that a fair election could be held is slight. I do not find the test to be, as the judge's finding and rationale might imply, what the judge or the Board thinks is the better way to obtain the employees' views with respect to unionization. The better way is an election. Recourse to cards, under *Gissel*, is justified when this better way is found to have been foreclosed.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your own or the union activity of your coworkers.

WE WILL NOT threaten you with discharge or other reprisals in retaliation for union activity.

WE WILL NOT threaten you with loss of jobs, wages, and benefits in the event you designate United Steelworkers of America, AFL–CIO–CLC, or any other labor organization, as your exclusive collective-bargaining representative.

WE WILL NOT discourage you from engaging in activity on behalf of United Steelworkers of America, AFL–CIO–CLC, or any other labor organization, by denying a promised pay increase or in any other manner discriminating with respect to wages, hours, and working conditions or tenure of employment.

WE WILL NOT refuse to recognize United Steelworkers of America, AFL–CIO–CLC as the exclusive collective-bargaining representative of our employees in the appropriate unit defined below:

> All full-time and regular part-time production and maintenance employees employed by us at our Somerset plant, Trailer plant and Bulow building facilities in Somerset County, Pennsylvania, excluding all employees of Lincoln Supply and Equipment Company's Central Trailer farm and family Center, retail sale employees, salesmen, office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above-defined unit.

WE WILL make whole Thomas Deist for earnings lost by reason of our discrimination against him, with interest.

SOMERSET WELDING & STEEL, INC.

Janice Anne Sauchin, Esq. and *Dalia E. Belinkoff, Esq*., for the General Counsel.

Richard A. Steyer, Esq. and *John J. Kelly, Esq. (Loomis, Owen, Fellman, & Howe)*, of Washington, D.C., for the Respondent.

John M. Coates, Staff Representative, of North Versailles, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. On a petition filed in Case 6–RC–9822 on March 17, 1987, an election was conducted on May 15, 1987, with the tally of ballots showing that 62 ballots were cast for the Charging Party Petitioner, 58 against, with 15 determinative challenges. Thereafter, both the Union and the Employer filed objections to conduct affecting the validity of the election. The Employer's objections were subsequently withdrawn. The challenged ballots later were opened and counted and, following withdrawal of three, seven were overruled by the hearing officer without contest, and the remaining five were overruled by the Board.[1] The revised tally dated December 7, 1988, showed rejection of union representation by a vote of 64 for, and 71 against.

Earlier, pursuant to an original unfair labor practice charge filed on March 17, 1987, a complaint had issued in Case 6–CA–19922, alleging that the Respondent independently violated Section 8(a)(1) by coercively interrogating and threatening employees concerning union activity. By order dated June 10, 1987, the Charging Party Petitioner's objections in Case 6–RC–9822 were consolidated for hearing therewith.

A second complaint was issued in Case 6–CA–20034 on July 10, 1987, alleging that the Respondent engaged in additional violations of Section 8(a)(1) by interrogating and threatening employees and by disparate application of fire-

[1] *Somerset Welding & Steel*, 291 NLRB 913 (1988).

arm and bulletin board restrictions, while condoning an employee's harassment of nonunion employees. Finally, that complaint alleged that the Respondent violated Section 8(a)(3) and (1) by refusing to recall an employee for discriminatory reasons.

Thereafter, on September 29, 1987, a third complaint issued in Case 6–CA–20250, alleging that the Respondent engaged in independent violating of Section 8(a)(1) based upon additional threats, and violated Section 8(a)(3) by laying off employees, withholding a paycheck, denying wage increases, denying overtime, and transferring an employee, all in retaliation for union activity.

Following issuance of the revised tally of ballots, a fourth complaint issued in Case 6–CA–20096 on February 23, 1989, alleging further independent 8(a)(1) violations, including interrogation, threats, and creating the impression that union activity was subject to surveillance. It was further alleged that the unfair labor practices set forth in all of the complaints are so serious and substantial as to preclude an effective remedy and fair election, and hence the desire for union representation, already expressed through authorization cards, would be best protected by a bargaining order. Accordingly, on authority of *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), it is alleged that, since March 17, 1987, the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as exclusive representative of employees in the appropriate unit.

In duly filed answers to each complaint, the Respondent denied that any unfair labor practices were committed.

By order of February 23, 1989, Cases 6–CA–19922, 6–CA–20034, 6–CA–20250, and 6–CA–20096 were consolidated with Case 6–RC–9822 for hearing, findings, and decision by an administrative law judge.

Pursuant thereto, a hearing was conducted by me on June 5 through 9, 1989, in Somerset, Pennsylvania. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent-Employer.

Upon the entire record in this proceeding,[2] including my opportunity directly to observe the witnesses and their demeanor while testifying,[3] and consideration of the posthearing briefs, it is hereby found as follows.

I. JURISDICTION

The Respondent is a Pennsylvania corporation with production facilities located in Somerset, Pennsylvania, from which it is engaged in the manufacture and customized modification of tractors and trailers, as well as the sale of truck equipment and related fabricated items. During the 12-month period preceding issuance of the initial complaint herein, a representative period, the Respondent in the course of said operations sold and shipped goods and materials valued in excess of $50.000 directly to locations outside the Commonwealth of Pennsylvania, and received at said facilities products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

The complaints allege, the answers admit, and I find that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaints allege, the answers admit, and I find that the United Steelworkers of America, AFL–CIO–CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. CASES 6–CA–19922, 6–CA–20034, 6–CA–20096, AND 6–CA–20250

A. *Overview*

The issue of primary concern in this proceeding derives from the General Counsel's claim that the Respondent's preelection misconduct was irreparably disruptive of free choice, hence requiring a remedial bargaining order under aegis of *NLRB v. Gissel Packing Co*., supra.

The Respondent is engaged primarily in the customized manufacture, installation, and repair of truck bodies, trailers and truck equipment. Its operations are conducted at three separate locations. All are in the vicinity of Somerset, Pennsylvania. They are known as the Somerset plant, the Bulow Building, and the Trailer plant.

There is no history of bargaining among the Respondent's employees. The instant campaign was spearheaded by employees John Tims Jr. and Bob Lee. They met with Union Representative John Coates on March 7, 1987,[4] signing union authorization cards at that time and agreeing to serve as employee organizers. A second meeting was conducted at the local ''Holiday Inn'' on March 14, with a number of employees attending. On the basis of employee interest,[5] on March 17, the Union requested recognition, and filed its election petition in Case 6–RC–9822 seeking an employer-wide, production and maintenance unit.[6]

According to the General Counsel, the Respondent replied with intimidation and reprisal. This position is founded upon testimony by a number of the Respondent's present and former employees who implicated seven named supervisors in independent 8(a)(1) violations, including interrogation and a variety of threats. In addition, it is alleged that through union literature and a series of four antiunion meetings, the Respondent's board chairman, Sidney Riggs, made unlawful references to the possibility of plant closure and loss of benefits, also suggesting that designation of the Union would be futile. Finally, the General Counsel argues that the Respondent violated Section 8(a)(3) and (1) of the Act through unlawfully motivated layoffs, delayed reinstatement, restrictive changes in work practices, a detrimental transfer, denied pay increases, and a withheld paycheck.

As indicated, the Respondent insists that it was not guilty of any unfair labor practices.

[2] Certain errors in the transcript have been noted and corrected.

[3] The fact that resolutions of credibility hereinafter made might be accompanied by objective rationale does not supplant, but is merely intended to enforce, impressions gained from my firsthand observation of the witnesses. Unmentioned testimony, whether or not contradicted, is rejected to the extent irreconcilable with expressly credited evidence and findings based thereon.

[4] Unless otherwise indicated, all dates refer to 1987.

[5] The record includes 76 facially unambiguous, single-purpose authorization cards purportedly signed by unit employees prior to March 17. (See GCX–100 et seq.)

[6] GCX–3.

B. *Interference, Restraint, and Coercion*

1. Bulletin board restrictions

David Faidley testified that employees were allowed to post what they wished on the bulletin boards until prounion items began to appear. At that point, he asserts, the Respondent published a rule requiring authorization by Guy Rush, the Respondent's vice president in charge of production, before messages could be posted. Faidley was not believed. Certainly those engaged in posting union literature would have been constrained by such a ban and hence aware that it existed. Yet, among the many witnesses offered to substantiate the complaints, not one confirmed the existence of any such rule. It is concluded that the General Counsel has failed to substantiate by credible proof that the Respondent published any written ban on union access to bulletin boards.[7]

2. Disparate restrictions on posting

The General Counsel contends that the Respondent violated Section 8(a)(1) by prohibiting prounion, while allowing antiunion, postings. The evidence adduced in this respect relates to postings on company property generally. The complaint, however, alleges violations only in the context of disparate bulletin board privileges, an allegation unverified by credible proof.

Nevertheless, the energetic litigation dehors allegation, began with David Gerhard, who testified that, on one occasion, he observed John Tims Sr., the superintendent at the Somerset plant, remove union literature from the bulletin board, including a document appealing for a ''yes'' vote, and then burn the literature in front of several employees. On cross-examination, Gerhard admitted that he did not observe Tims remove any documents from the bulletin board, but that those burned were recognized as similar to those he had seen posted at that location.[8] In any event, I credit Tims' denials that he either removed from the bulletin board or burned any union literature.

This does not mean that Tims never removed a prounion poster. He admits that, a few weeks before the election, he climbed high into the rafters above the body shop to remove a 3-by-4 foot prounion placard.[9] There is no evidence that Tims did this under the guise of any established, published rule. Nevertheless, Kenneth Mishler suggests that this action was disparate. In doing so, he first accused Tims of declining to remove four or five antiunion posters from the wall in the body shop. Then, on cross-examination, he could recall only a single ''vote no'' sign and that had been posted in the hoist room.

There was also evidence that Tims had threatened employees with discharge to restrict prounion postings. In this respect, a question exists as to whether these threats related to anything other than adhesive stickers. The stickers carried a prounion message and during the campaign had been affixed to doors, truck bodies, and machinery. They ranged in size up to 2 inches by 4 inches. On some surfaces, such as doors and truck bodies, they were difficult to remove.

The confusion begins with testimony by Ken Mishler that, after Tims removed the prounion poster, Tims told the men ''if any more union posters was put on company property you'll be fired immediately on the spot.'' However, Mishler would later admit that he may have been confused by the focus of this warning, testifying that he could not recall whether Tims' reference was to posters, signs, or stickers. Mishler acknowledged that the stickers were a problem, and further offered that Tims told the men they could wear stickers on their personal property.

Cary Mishler confirmed that he too observed John Tims Sr. remove a ''Vote Yes'' sign from the body shop, without removing a ''Vote No'' placard, which he claims to have been posted in the hoist shop. Having done so, he avers that Tims approached the men stating:

> [I]f he caught anybody putting any kinds of stickers or signs up on company property on company time he would fire us right on the spot . . . . [H]e said we could put them on personal belongings . . . that's okay, but not on company property.

Robert G. Lee, who with John Tims Jr. was the first to meet with union officials, testified that he was present when John Tims Sr. told the men ''if he caught anybody putting any stickers up that he would fire them on the spot.''[10]

Another employee, Lewis Ewing, who attributed similar threats to John Tims Sr., avowed that during that same day Tims stated that employees were free to wear the stickers on personal items, including their hard hats and tool boxes, but could not affix them to company property. Ewing admits that he was wearing his stickers when Tims made the discharge threat, but did not relate that he considered this to be in violation of that warning.

Tims confirms that after removing the prounion sign from the overhead rafters, he told a single employee, Ted Persuhn, that he didn't want to see that up there any more. He claimed that he had seen only one posted, antiunion reference. That had been inscribed on a board notice in graffiti style. Thus, according to Tims, someone had written vote ''Yes'' on the poster, but the next time he looked, this was stricken through, with vote ''no'' written in its stead. He denied seeing a ''vote no'' sign in the hoist shop. In any event, vagaries, and the somewhat underdeveloped proof offered by the General Counsel in this respect, precludes a finding that antiunion posters were visible for any prolonged period. I credit Tims' denials that he observed the ''vote no'' sign prior to its removal. Moreover, on the face of the General Counsel's own testimony, it is fair to assume that the antiunion posters were removed shortly after they appeared.

Tims also testified credibly that the stickers were a nuisance, having been affixed everywhere, and that he stated

[7] Although Faidley's testimony in this respect was uncontradicted, I am unwilling, on that basis, mechanistically to accept that which common sense brands as unbelievable. Considering the multiplicity of allegations and the wealth of testimony adduced against the Respondent, I believe it more likely that oversight allowed this sliver of untrue testimony to escape unchallenged.

[8] The General Counsel places a small, but significant ''spin'' on this testimony, describing Gerhard as having sworn that ''he did recognize the documents as the material that had been up on the bulletin boards.'' This was not his testimony at all. Although the difference is facially slight, Gerhard's actual version does not warrant any reasonable inference that any document was taken from a bulletin board.

[9] Tims' action in this regard was inoffensive to statutory concerns. See *Benjamin Coal Co.*, 294 NLRB 572, 582–583 (1989).

[10] At the time, Lee was aware that the stickers had been ''put up'' on doors and machinery. Though he was with others when confronted by Tims, he was the sole witness for the General Counsel that denied being told that he could ''wear stickers on his personalty [sic]. I did not believe him.''

that he ''don't want to see anymore of them up,'' that they could be fired if they did, but that they were privileged to place them on their personal property.

Under the relevant 8(a)(1) allegation, the threats imputed to Tims pertained only to bulletin boards. Here again, the evidence adduced cast a broader shadow of illegality than set forth in the complaint. The testimony offered by the General Counsel suggests that Tims imposed a plantwide restraint on union postings, and stands among several important variances between allegation and proof. In fact, the General Counsel's posthearing brief theorizes that the threats were unlawful because they impeded the right of employees to ''display union insignia in the work place.'' This is a far cry from anything described in the complaints.

Nevertheless, I did not believe testimony by the Mishlers that Tims' threats related to postings other than stickers. The use of stickers on company property was a pernicious practice which the Employer had the right to eliminate, on pain of discharge. Were the Mishlers believed, however, no different result would follow. I know of no statutory policy compelling employers to consecrate the entirety of their property to prounion use during an initial organization campaign.[11] Parity is not required here any more than other vestiges of an employer's antiunion campaign. The Employer is free to deliver its legitimate message against representation without compulsion under law to extend equal rights to prounion elements, be they employees or outside organizers. The law does not operate to divert company property to union purposes simply because plant premises are a medium for antiunion propaganda.

The General Counsel's diverse views on illegal restraints on prounion postings, whether or not alleged, are rejected as unsupported by credible proof.

3. Charles Grandll, the Respondent's employee agent

a. *The firearms prohibition*

The General Counsel contends that the Respondent violated Section 8(a)(1) by failing to invoke an established, published firearms ban against an antiunion employee, Charlie Grandll.

There is no dispute that the Respondent posted a rule prohibiting employees from bringing weapons, guns, and any ammunition of any kind on company property. However, the General Counsel contends that the ban was promulgated prior to the Union's appearance, while the Respondent asserts that this ban was adopted later and in response to the conduct of Charlie Grandll.

During the campaign, Grandll was a welder in the body shop at the Somerset plant.[12] He admittedly brought a handgun to work on one occasion. Previously, according to his uncontradicted testimony, Dave Tims, a coworker had accused Grandll of stealing materials. Grandll, in consequence, bested Tims in a fight. These events had nothing to do with union activity. Nevertheless, Grandll later was told by his foreman, Baughman, of a threat by the Union to teach Grandll a lesson for beating up Tims.[13] After reporting the threat to the police, Grandll brought his gun to work, with full knowledge of Baughman, in order to protect himself.

The General Counsel describes Grandll's conduct as ''purely anti-union.'' To this end, several witnesses were offered to depict Grandll's antics on that occasion. Thus, according to Cary Mishler, many months before the organization campaign, a notice was posted precluding employees from bringing firearms and ammunition into the plant. He adds that about a week before the May 15 election, Grandll, as he had promised the day before, brought a handgun to work. When Mishler asked about it, Grandll showed him that the handgun was concealed under the Grandll's field jacket. When asked by Mishler if it were loaded, Grandll simply pulled a handful of shells from his pocket. Grandll, who claimed to have been threatened that ''he was going to be paid a visit from the union,'' explained to Mishler ''if them son of a bitches come in and harass me, . . . I need something for protection.''[14] The incident occurred before starting time, and Mishler had no knowledge that Grandll possessed the weapon while working.

David Gerhard testified that a couple weeks prior to the election, Grandll told him he had been threatened and was carrying his 44 magnum for protection. According to Gerhard, a day or two later, he asked Grandll if he was ''still packing his gun,'' whereby Grandll slapped his side, stating he was hunting two-legged deer, and ''it wouldn't leave his side.''

David Faidley, who was not actively employed at the time of the hearing, apparently because of work-related injury, testified that he observed Grandll with the weapon during working hours. Unlike the others, Faidley claims that Grandll was ''flashing it around a lot.'' Faidley testified that Grandll told him he was in need of protection because, ''the union guys was going to stomp his butt because of the hassle he had with Dave Tims.'' Faidley adds that Grandll tore down the posted firearm prohibition, while stating that this step was required to prevent someone from finding out that he was doing something wrong.[15]

James Brand states that during the shift, Carlos Sprankle told him that he ''believed'' that Grandll had a gun. Brand investigated and observed a bulge under Grandll's shirt at the hip but could not be sure of its nature. Later that afternoon, Brand placed a ''safety zone'' marker in his work area. This attracted Grandll, who inquired as to its purpose. Brand indicated that he heard that Grandll had a gun. The latter responded by grinning and stating,'' when the bullets start flying . . . you better crawl underneath the table.'' Brand's suspicions were confirmed at the end of the shift, when during

[11] *Benjamin Coal Co.*, supra at 582–583 (1989). The General Counsel's reliance upon *Honeywell, Inc.*, 262 NLRB 1402 (1982), is misplaced. That case, while denying such intention, in effect, establishes a per se rule. For, it is difficult to imagine that an employer would maintain a bulletin board while excluding all nonbusiness access. Under *Honeywell*, union access is required in the absence of such an exclusion. Does this mean that any nonbusiness use of an employer's property requires that the property be opened for organizational purposes? In my opinion, *Honeywell* should be restricted to areas held open generally to public announcements, such as bulletin boards. This is necessary to avoid the intrusive result inherent in a rule which would open premises generally to union access whenever used by an employer for a nonbusiness purpose, whether to counter organization activity, or for some civic cause totally unrelated to union activity.

[12] At the time of the hearing, he was a supervisor at the Trailer plant.

[13] David Tims did not testify. An authorization card purporting to bear his signature was authenticated by a union representative, Tom Antal. (GCX–109.)

[14] Robert G. Lee, who worked a different shift, in response to a leading question, testified that he recalled seeing Grandll with a gun, which Grandll said was needed for protection.

[15] Apart from the fact that Faidley's testimony imputes a nonsensical display to Grandll, if Grandll had the blessing of management, would there have been a need that he engage in this cover up?

the cleanup period, Grandll allegedly emerged from the breakroom, with pistol and holster over his head waiving it about as he passed through the shop to punch out. Brand concedes that this incident would have been witnessed by a number of employees. Brand could not identify any supervisors who might have observed the incident, though he speculated that Baughman was usually in the area at that time.

Later, Mishler reported the matter to Foreman Baughman, who indicated that he was aware of Grandll's action. Baughman told Mishler that, the night before, Grandll told him he would bring in the weapon, to which Baughman replied that he would do the same were he Grandll. According to Mishler, unless, he was ''mistaken'' about 2 nights later, at cleanup, he observed Grandll returning the weapon under his jacket.

Vice President Rush testified that employee Lewis Ewing reported the incident to him. Rush told Ewing he would look into it immediately. Rush, with corroboration from Grandll, testified that he then sought out Grandll, who said he had removed the gun, having been previously told to do so. Grandll allegedly reported that he was told this twice, once by Baughman, and again by someone that Rush could not recall.

On the threshold issue, Rush denied that a written policy concerning this issue was in effect at the time. He claims that in consequence of this incident, a notice was drafted, typed, and posted on the bulletin board banning all guns.[16] Apparently, no copies were made. Rush also testified that no one had ever been disciplined for carrying a weapon into the plant. In this respect, I believed Rush and Grandll over Faidley and Mishler and find that, at the time of the incident, the Company had yet to promulgate any policy concerning firearms, and hence, contrary to the General Counsel, no such ban could not have been relaxed in Grandll's case.[17] Accordingly, the 8(a)(1) allegation in this respect is unsubstantiated and shall be dismissed.

b. *Harassment of prounion employees*

Grandll is central to allegations that Respondent violated Section 8(a)(1) by permitting, encouraging, and using him ''to harass and intimidate its employees because they supported the Union.''

In this connection, the General Counsel points to the above testimony that employees were alarmed by the presence of Grandll's weapon. Assuming they were, there was no evidence and no reasonable basis for assumption that this was a gesture designed to influence them one way or the other on the issue of union representation. In this same vein, all who testified confirmed that the weapon was possessed by Grandll for purposes of self-defense, with no one suggesting any threat or expressed intention on his part to use it as a means of menacing union adherents. Moreover, on the credited facts, it is concluded that management reacted in due course, limiting the matter to a single shift, while promulgating a formal ban on similar misconduct. In any event, as shall be seen, there was no evidence fairly warranting a conclusion that Grandll had real or apparent authority to act on behalf of the Respondent in this regard.

Apart from the pistol incident, Lewis Ewing was the pivotal witness against Grandll. Critical aspects of his testimony were left to stand uncorroborated. Ewing was a prounion employee, who signed a card, encouraged others to do so, attended union meetings, and wore union stickers and buttons. He implicates Grandll in abusive behavior toward him, some relating to union activity, the rest, neutral. According to Ewing, Grandll would come into his area calling him names, such as ''dirtball'' and urging him to go back to Florida.

The major incident related to union activity was described by Ewing as having occurred about 2 weeks before the election. At the time, he claims to have arrived at his workstation, finding a rubber chicken with a dead rat in its mouth, hanging from a crane, with an attached sign stating: ''vote yes for the union, Lewis.'' Ewing states that he was the only ''Lewis'' in the plant. He claims that he tore down the display and threw it in the garbage can.

The next morning, when Ewing reported to work, the same chicken with a dead rat in its mouth was above his workbench, with a sign that said vote ''yes.'' Ewing relates that he tore this down as well, but threw the chicken under a truck.

Ewing apparently could not tie Grandll to the incident directly. However, he did relate that at noon that day, Grandll brought the chicken to the lunchroom and told Ewing, ''this chicken would look better with a live rat stuck in its mouth.''[18]

Ewing, without accusing Grandll of hanging the chicken, complained to Rush, and requested that he see to it that Grandll's harassment stop. Rush pointed out that this was Grandll's nature and that Ewing should learn to take it. However, when Ewing persisted in demanding that Grandll be corrected, Rush agreed to talk to Grandll and to ''have it taken care of.''

However, Ewing relates that 2 days later, Grandll entered his work area, stating to Ken Mishler, another prounion employee, ''something stinks around here, doesn't it.'' When Mishler did not reply, Grandll said, ''it smells like a dead rat here.''[19]

Finally, Ewing describes an incident when he went to the office of Tims and Rick Miller, where he ran into Grandll. The latter said that he heard that Ewing was looking for him, wanting to kick Grandll's butt. After being denied by Ewing, Grandll stated, ''what'd the union do, offer you a bar of soap to vote yes.'' Ewing simply walked off.

Guy Rush acknowledges that Ewing on several occasions complained that Grandll was calling him names. He adds that Grandll was not the only coworker that Ewing complained about. Rush states that on each occasion, he would seek out Grandll and admonish him, ''he's got to stop this completely . . . I don't tolerate it.''

Grandll, who described himself as one who agitates everyone, admits that he did so in the case of Ewing. But he denied any involvement in the chicken/rat episode, claims that

[16] Grandll also testified that the ban was not posted until after he brought his handgun to work. Moreover, doubt as to their capacity for clear recollection, requires rejection of testimony of David Gerhard and Cary Mishler that the weapon was in Grandll's possession on more than 1 day. In this respect, I believed Grandll that he did this on but one occasion, and that the handgun had been removed by the next morning.

[17] It is not without significance that Lewis Ewing, a key witness for the General Counsel, confirmed that when reported the incident to Rush, the latter stated ''there was really no policy on fireman.''

[18] Not a single witness testified that they had seen or heard of any antiunion conduct by Grandll toward Ewing, or anyone else, or that they were aware of the chicken/rat incident.

[19] Ken Mishler testified but was not examined as to any such incident.

he neither touched nor saw the chicken, and that he never even discussed the incident with Ewing. Finally, he states that he was asked by Baughman, Rush, and Plant Superintendent Tims to stop giving Ewing a hard time.

Basically, I believe that Grandll's teasing of Ewing was an ongoing phenomenon that was not oriented in their diverse views on the organizational issues. Neither Ewing nor any other witness identified others treated in this fashion by Grandll, though many had openly manifested union support.

The allegation that Grandll was an agent of the Respondent borders on frivolity. The fact that he was depicted kissing the boss' feet in union campaign propaganda, (RX–1(e)) does not prove that he did so, and is no substitute for proof, totally lacking here, that Grandll participated to any significant degree in the Respondent's effort to persuade others to reject the Union. The evidence goes no further than testimony by Robert Lee, one of the earliest protagonists of the Union, that Grandll told him that ''he wasn't for the union and it wasn't no good . . . he didn't think it was the right way to go.'' Moreover, the General Counsel's own evidence fails to substantiate in even the most remote sense that any antiunion behavior on Grandll's part was aided, abetted, condoned, or ratified by the Respondent.[20] The General Counsel has failed to establish, even in prima facie terms, that Grandll was an agent of the Respondent within the meaning of Section 2(2) of the Act.

For the above reasons, the 8(a)(1) allegations founded upon conduct imputed to Grandll are totally lacking in evidential support, and shall be dismissed.

4. Interrogation

The several complaints impute coercive interrogation to four members of management. The evidence and my findings and conclusions in this regard are set forth below.

a. *By Guy Rush*

As indicated, Rush is the Respondent's vice president in charge of production. His authority extends to all three plants. Several witnesses suggest that, during the early stages of the campaign, he was busily involved in an effort to uncover just who was responsible for union activity.

Thus, Joseph Sharbaugh, who is currently employed, and during the campaign worked at the Trailer plant, received a telephone call from Rush on Monday, March 16, in which he was question, as to who was involved in the union movement. Sharbaugh declined to divulge the names. Sharbaugh was also questioned as to what was wrong in the shop and whether he thought the movement could be stopped. When this was answered in the negative, Rush allegedly stated ''if things were that bad at the Trailer division, we really didn't need that building out there.'' Rush, according to Sharbaugh, also stated that the Union was unnecessary, as he would have taken care of the problems if the employees had spoken to him.

Sharbaugh adds that 2 days later, Rush called once more in a repeated effort to ascertain whether the Union could be stopped and the identity of employees responsible. Sharbaugh again refused to cooperate.

In a subsequent incident, Rush, according to Sharbaugh, on April 2, asked him if he had attended union meetings, while advising him to vote ''and vote the right way.''

David Faidley related that he too was approached by Rush on March 16. The incident occurred at his workstation. Faidley had signed a union authorization card that very day. According to Faidley, Rush, who was always business-like and to the point, on this occasion was unusually friendly, opening the conversation at a personal level, but going on to inquire as to ''who started the union?'' Faidley who described himself as uneasy with this inquiry, stated that he did not know.

Concerning Sharbaugh, Rush insists that the first phone call was initiated by Sharbaugh, who reported that union solicitation was in progress. Beyond that Rush had no recollection of what was said. However, he denied ever having asked employees whether they started or were involved in the Union, or stated that the Respondent would close the Trailer plant. I credit the testimony of Sharbaugh and Faidley. Notwithstanding my misgivings concerning the latter, in this instance his testimony, confirmed by Sharbaugh, discloses a common pattern whereby Rush attempted to use them to satisfy his curiosity concerning union activity during the initial phase of the campaign. This entirely plausible evidence,[21] implicates a vice president in an investigation that naturally would impede Section 7 rights. Apart from his reference to the Trailer plant's fate, his effort to identify those involved tended to undermine—at least to Sharbaugh and Faidley—confidence that union support might be waged beyond the ears of management. The Respondent thereby violated Section 8(a)(1) of the Act.[22]

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[20] Absent a link with management, the Act does not guarantee or require that all employees get along with one another, nor does it establish a generic ''fellow servant'' standard protecting all union supporters from abusive behavior irrespective of their source. If Ewing were believed, the requisite link would not be completed by his testimony that Grandll, in the presence of Foreman Rick Miller, made a union-related slur.

[21] The Respondent argues that Sharbaugh's account was implausible. On the contrary, this would not be the first time that a manager reacted to news of union organization by attempting to get to the bottom of it. Moreover, the argument that Rush would have telephoned a more tenured employee than Sharbaugh to seek out such information was also unpersuasive. First, the record does not substantiate that he did not do so. Second, at the time, Sharbaugh had been employed for 3 or 4 years. Finally, I do believe that this incumbent employee manufactured the incident out of whole cloth.

[22] The independent 8(a)(1) allegations are distributed through four separate complaints. Numerous incidents are involved and many witnesses were called by the General Counsel to give accounts of even more confrontations with supervisors. At the hearing, the General Counsel was represented by two attorneys. Various steps were taken by me in the course of the hearing to structure the proceeding in a fashion which would facilitate identification of the issues, while isolating evidence to specific allegation. In a case of this kind, the opportunities for mismatching evidence against allegation requires advocacy on the part of the proponents of the complaints, rather than a dependence upon the administrative law judge to pick up the pieces. Cf. *Inland Steel Co.*, 257 NLRB 65, 68 (1981). To that end, and in order that the record be developed in an understandable fashion, so as to allow expeditious processing and resolution fair to all parties, the proponents of the complaints were instructed at the hearing to brief specifically the evidence claimed to warrant an unfair labor practice finding, and that no findings would be made with respect to matters omitted. In a brief of 88 pages, at least 2 episodes were not identified. First, is testimony by John Tims Jr. that while unemployed due to injury he received a medical release in late April and went to see Rush for purposes of securing reinstatement. Rush at that time asked him how he felt about the Union and what it would do for the Company. Second, Bradley Barclay, a former employee, testified that prior to the March 14 union meeting Rush asked if he were aware of the ''union thing.'' When Barclay said, ''yes,'' Rush inquired if Barclay intended to go to the union meeting on Saturday.

b. *By Roger Pyle*

Pyle, at times material, was a foreman in the Trailer plant. Richard E. Miller testified that in late March, Pyle, his immediate supervisor, asked if he had received a letter from the Union. Miller said he had. Pyle expressed curiosity at its content, but Miller declined to cooperate. The conversation apparently ended with Pyle's remark that he wasn't for the Union anyway. On cross-examination, it was developed that Miller was thoroughly confused concerning the letter. His prehearing affidavit shows that on July 29, 1987, Pyle approached him concerning a letter he had received from the Board, not the Union. At that time, Pyle said that he didn't get one, probably because he did not sign an authorization card.

In the circumstances, the dubious nature of Miller's testimony leads me to give credence to the denials by Pyle that he ever questioned anyone concerning union activities. The 8(a)(1) allegation in this respect is dismissed.

c. *By John Tims Sr.*

John Tims Jr. was a key protagonist of the Union and one of its initial contacts. Prior to the election he was out of work due to a disabling injury, but was avidly seeking restoration. After the election, he returned to work, and was advanced from welder to shop foreman. At the hearing, he showed a reluctance to testify concerning discussions with his father, Superintendent Tims. However, when confronted with his pretrial affidavit, Tims confirmed several contacts, including one the night before the election, when his father called him, asking how he would vote. When Tims Jr. was noncommittal, he was pushed for an answer. They argued concerning the pros and cons of unionization, thus, allowing Tims Jr. to reveal himself. Tims Sr. admits to calling his son 2 days before the election in order to inquire as to how he felt about the Union and which way he was going to vote. Tims Jr. was not available, but returned the call later that evening. Tims Sr. believed that his son had been drinking.[23] He admits to asking how his son intended to vote, whereupon he was told that it was none of his business. Tims Sr. admitted that an argument ensued and that the conversation ended ''heatedly,'' with his hanging up. He also conceded that the bitter exchanges with his son took a long time to heal.

It is fair to infer that Superintendent Tims initiated this confrontation fully aware of his son's economic situation and quest for reinstatement. The phone call, the night before the election, led to an argumentative discussion, together with threats that are the subject of findings made below. The entire incident appears to have been spawned as a purposeful attempt to influence a son's vote. The familial relationship in this instance tended to enforce, not lessen, improper pressures. The suggestion that Tims Sr. was not acting in his capacity as a company representative is belied by the remarks imputed to him. I credit Tims Jr. and find that the Respondent violated Section 8(a)(1) through this instance of coercive interrogation.

d. *By Dwight Clyde*

Clyde is plant manager at the Trailer facility.[24] According to Lloyd Harkcom, during the campaign, Clyde told him that he had talked to quite a few men and knew how they were going to vote. When Clyde asked Harkcom how he felt about the Union, the latter declined to comment. Clyde denied this entire line of Harkcom's testimony. I believed Harkcom. It does not appear that Harkcom, previously, was open with his sentiment. Clyde's inquiries were not supported by any legitimate objective. Moreover, the attempt to elicit Harkcom's views, while implying that others had cooperated by their responsiveness, would naturally be a source of added pressure. In this context, the interrogation was coercive and the Respondent thereby violated Section 8(a)(1) of the Act.

6. Creating the impression of surveillance

The General Counsel describes the testimony offered in substantiation of this allegation as follows, ''[Dwight] Clyde stated to [Lloyd] Harkcom that he had talked to quite a few of the employees and he knew which way they were going to vote in the upcoming election.'' On the face of this evidence, it is clear that Clyde defined the source of his information as conversations, not surveillance.[25] Accordingly, the attribution itself obviates any reasonably based interpretation that information was developed on the basis of any type of involuntary disclosure, and, hence, the evidence does not substantiate the alleged violation and the 8(a)(1) allegation in this respect is dismissed.

5. Threats of reprisal

a. *Supervisors' statements*

(1) By Roger Pyle

Lloyd Harkcom testified that about 10 days to a month prior to the election he overheard a conversation in the office at the Trailer plant between admitted Supervisors Pyle and Rod Berkley. At the time, both apparently were mindful of his presence. Also in the area was Bonnie Schuler, the secretary/receptionist at the Trailer plant. At that time, Pyle allegedly mentioned that ''Sidney Riggs made a statement that if the union came in he'd close the plant down.''

According to Mark Taylor, on the day after the election, he had a conversation at his workstation with Roger Pyle, in which Pyle opined that ''he would look for a job because he . . . [thought] that if the union would come in that Sidney would shut the plant down.''

Pyle denied the shutdown comments, but admits that when requested, he offered his opinion as to what he thought of a union coming to Somerset, which included the ''possibility of losing what we already had.'' I credit Taylor and

[23] This struck as speculative based upon Tims Sr.'s premise that his son never swore at him unless intoxicated. If the latter had been drinking, this would not explain the misconduct on the part of Tims Sr. or his continued participation in the conversation. His testimony does not support a finding that Tims Jr. labored under any disability that might have impaired his recollection of what transpired.

[24] Clyde reports to Vice President Rush. The latter is based at the Somerset plant. Rush testified that Clyde has no authority to hire, fire, lay off, or grant wage increases, but may only recommend such action. Nevertheless, he obviously is the highest ranking management representative with immediate day-to-day responsibility for trailer operations.

[25] It is of interest that the General Counsel when questioned, declined to assert any illegality on the basis of Sharbaugh's testimony that Rush told him ''he had heard'' of the union meeting held at the Holiday Inn on March 14.

Harkcom, and find that the Respondent violated Section 8(a)(1) through Pyle's threats.[26]

(2) By Rod Berkley

Randy Keyser testified that his supervisor, Rod Berkley, told him that ''it was his opinion that if the union was voted in, they would just phase the company out. . . . they have another shop in Maryland [and] . . . they could move down there.''

On another occasion, Keyser had heard from other employees that Berkley was going around speaking to individuals about ''zero-based bargaining,'' causing Keyser to seek him out. During their ensuing discussion, Berkley stated that he should be allowed to vote because ''if they go out of business . . . . he's going to lose his job too.'' Berkley also allegedly stated that, if the Union is defeated, some wearing union buttons and talking a lot ''probably won't have jobs after its over.'' Keyser asked, ''like me,'' whereupon, Berkley chuckled and replied, ''probably.''

Consistent therewith, Mark Taylor, an incumbent employee, avers that Berkley, at his workstation, used words to the effect that certain people, including Randy Keyser were more or less to blame for this and that ''actions would be taken against them to make sure that . . . the union didn't come through.''[27]

Another employee, John Wegrzyniak, whose employment terminated prior to the election, testified that in late March or early April, Berkley, his immediate supervisor, told him that ''if we got the union in . . . we'd probably shut the place down.'' Wegrzyniak disputed that this would be the case.

Berkley denied make statements that if the Union got in (1) wages would be put back to zero, or that (2) people would probably lose their jobs. He emphatically denied telling Wegrzyniak that if the Union were designated, the place would probably be shut down. He denied ever telling Taylor that certain employees, including, Randy Keyser would be disciplined or fired after the election. In fact, he could not recall ever even giving his opinion to employees concerning the Union. I believed Keyser, Wegrzyniak, and Taylor, who attribute a common pattern of coercive conduct to Berkley. It is concluded that the Respondent violated Section 8(a)(1) by his various threats of closedown, discharge and undisclosed recriminations in response to union activity.

(3) By Dwight Clyde

Randy Keyser testified that Plant Manager Dwight Clyde, of the Trailer division, during the first week in May, approached him, stating, ''you better vote no on May 15th or there isn't going to be any jobs around, there won't be no more work there.'' Keyser expressed disbelief, but Clyde replied ''you better believe it because that's what he was told.''[28] At the time, Clyde supposedly was in an agitated state, having just removed ''vote yes'' epithets soaped on company property. This appears to have been the same conversation allegedly overheard by a coworker, Mark Taylor. However, his version is less graphic. He relates that Clyde simply stated that ''if the men in the shop knew what was good for them . . . . [they] would vote no against the union.'' When Keyser laughed at this remark, according to Taylor, Clyde angrily turned and walked away. Clyde denied the remarks attributed to him by Keyser and Taylor. While I doubt the incident was fabricated, Keyser's account is rejected, in favor of the more generalized description by Taylor. As an abstraction, the words attributed by him to Clyde would not run afoul of the Act, but in the context of other coercive threats of reprisal, and repeated references to close downs and job loss in the Company's antiunion propaganda, this warning would naturally convey that reprisals would be avoided by rejection of the Union. By his remark, the Respondent violated Section 8(a)(1) of the Act.

Richard Keyser, Randy's brother, testified that, after one of the captive antiunion meetings, Clyde appeared with a profit sheet pertaining to three completed trailers, demonstrating the slight profit margin involved, while arguing that, with any wage increases, ''there'd be no way that the shop could continue to go.'' Clyde recalled the incident, but not everything that was said. He claims that he offered the ''summary sheet'' to rebut claims that the Company was making a lot of money. He told the employees that the small margin involved could be exceeded by placing the investment in a savings account. However, his testimony does not refute Richard Keyser's assertion concerning the future of the shop. Clyde had every right to demonstrate the slight profit margins involved in producing these *three* trailers, but that evidence was too isolated to privilege any comment suggesting that the Trailer plant would close in the event of wage increases. As in any campaign, many employees would perceive union representation as the means to raise pay levels. Clyde's remark was tantamount to warning that employees could not have their jobs and a wage increase too, and if they supported the Union for that reason, they had better vote no. This is precisely the type of threat that will escape interdict only if ''carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.'' *Gissel Packing*, supra, 395 U.S. at 618. As the proof offered to the employees on that occasion was too narrow to support closure under this standard, Clyde's threat violated Section 8(a)(1) of the Act.

Joseph Sharbaugh, an incumbent employee, testified that during the week prior to the election, Clyde at quitting time, called a group of five or six together, stating, ''Sid Riggs was real mad and upset about the union and he was going to close the plant if the union went in.'' Clyde denied ever having heard Sidney Riggs make such a remark, and denied having reported to Sharbaugh that he did. Despite the ab-

[26] The Respondent argues that as Pyle was a low level supervisor, his statements should be disregarded as ''less likely to influence the employee's decision than statements by high level officials which bear the imprint of company policy.'' The same assertion is advanced with respect to Rod Berkley whose coercive conduct is discussed below. There is no merit in this view. The unlawful statements by both carry a sufficient resemblance to ideas spawned by Sidney Riggs, in his unlawful attempts to influence employee choice, to ''bear the imprint of company policy.'' Cf. *Hecla Mining Co. v. NLRB*, 564 F.2d 309, 315 (9th Cir. 1977).

[27] On cross-examination, it was established that this conversation related to the length of Keyser's expected stay in the Trailer plant, that Berkley also said changes would occur irrespective of the election results, and that, at this point, when Taylor asked if Keyser would be one of ''those,'' Berkley answered, ''probably.'' In my opinion, these additions are too vague to establish a clear inconsistency in Taylor's overall account.

[28] Rush testified that he did not tell anyone that if the Union were designated, the Company would close the Trailer plant and move everyone back to town.

sence of corroboration, I believed Sharbaugh, and hence find that the Respondent thereby violated Section 8(a)(1) of the Act.

(4) By John Tims Sr.

Tims was the superintendent at the Somerset plant. As indicated his son, John Tims Jr., was a key protagonist of the Union. The latter, who during the period after the election was advanced from welder to shop foreman, though a reluctant witness, when confronted with his pretrial affidavit, confirmed he was told by his father that ''if the union was voted in the company would take away all our benefits,'' and who added, ''the plant would close if the union won.'' Moreover in their telephone conversation as they argued concerning the pros and cons of unionization, Tims Sr. at that juncture said he would fire his son.

Tims Sr. admits to calling his son 2 days before the election in order to inquire as to how he felt about the Union and which way he was going to vote. Tims Jr. was not available but returned the call later that evening. The latter in response to the inquiry as to how he would vote told his father that it was none of his business. They argued, whereupon Tims Jr. said, ''I guess you're going to fire me.'' Tims Sr. replied that, if given just cause, he would discharge him, not because of the Union or their kinship, but for ''just cause.'' Tims Sr. admitted that the conversation ended ''heatedly,'' with his hanging up, and that the bitterness took a long time to heal.

Tims Jr. was entirely credible and references by his father to removal of benefits and discharge, both as reprisals for union activity, violated Section 8(a)(1) of the Act.

(5) By Guy Rush

As heretofore indicated, on Monday, March 16, incumbent employee Joe Sharbaugh credibly described a phone call he received from Vice President Rush, in which the latter stated as follows:

> He asked me if I heard any rumors about the union movement and I said, yes. . . . [H]e asked me who was involved. . . . I told him I wouldn't give him the names. He asked . . . if things were that bad in the shop . . . I said, yes. . . . [T]hen he asked me what was wrong. I said there was a lot of favoritism to some guys and not other guys and there was no apparent reason for it. He asked me if there was any way I thought the movement could be stopped . . . I said, no, I didn't think it could be. . . . [H]e had asked me . . . if things were that bad at the Trailer division, we really didn't need that building out there. I told him that it got started in town and it just got back to the Trailer division.

Having credited Sharbaugh, the statement that the Trailer plant really would not be needed implied that it would be closed if employees felt ''things were that bad'' that ''the movement could not be stopped.'' The Respondent thereby violated Section 8(a)(1) of the Act.

(6) By Clark Emert

Emert supervised a retail sales operation on premises shared with production operations at the Somerset Plant. The voting group excluded ''retail sale employees.'' Gary Reiber related that while he was employed at that location, Emert told a group of employees that he was against the Union, that it could be of no help at the time, and that while the Union would collect the employees' money, it would not stand behind them. Finally, according to Reiber, Emert stated that, ''he would not have a person in the union working under him.''

Emert denied having made these statements. Absent corroboration, or specification of the timeframe involved, my inclination is to give benefit of the doubt to this management representative who, during the period immediately prior to the election, had no reason to attempt to influence his employees against union activity. Accordingly, the 8(a)(1) allegation based on Reiber's testimony in this respect is dismissed.

b. *Antiunion propaganda*

The General Counsel contends that the Respondent violated Section 8(a)(1) through propaganda disseminated during the preelection period by the Respondent's chairman, Sidney Riggs, both in the course of speeches and through mailings delivered to employees.

(1) Captive audience speeches

Numerous witnesses were called to advance their recollection of what was said on these occasions. However, admissions by Riggs constitute the only reliable basis for evaluating the 8(a)(1) allegations in this regard.[29]

Riggs testified to having held a series of four meetings in the various plants, each ranging from 30 to 60 minutes. Aside from his own self-generated presentation, he responded to questions raised by employees. He admittedly discussed his view that it was ''survival time'' for industrial operatives in the Somerset labor market. He identified a number of plants, almost all unionized, that had closed in recent years, stressing that, ''I had an obligation to learn from these problems and try to structure Somerset Welding so that the same thing doesn't happen to it.''

Riggs asserts that, although he did not go into detail, he told the employees that the closedown of these plants was not only caused by labor problems, but by management problems as well. Abex was one of the plants singled out. This plant was opened to build rail wheels with a large subsidy from the State, but as told by Riggs, early in its operations the Steelworkers Union called a strike. The employees were told that ''the plant never reopened as a viable business after that.'' Riggs claims that he mentioned other causes such as a slump in the market for railroad wheels, and the fact that

[29] Sec. 8(c) protects an employer's right to address the issue of union representation, provided that its views are devoid of threat of reprisal or promise of benefit. Argumentation has been upheld as legitimate speech, even if, upon interpretation, the listener might walk away with the understanding that a reprisal was involved. For that reason, the appraisal under Sec. 8(c) must focus on exact words used, as distinguished from the listener's understanding or subjective belief of what was intended. In this case, I did not believe that any of the witnesses presented by the General Counsel were capable of recalling Riggs' precise remarks, made some 2 years earlier. To do so, without benefit of some form of recordation and without editorializing his statements with personally held fears and assumptions, would have amounted to a truly remarkable achievement. While I reject the entirety of this testimony, salient aspects, together with more specifically framed doubts as to its verity, are summarized in Appendix B, attached to this decision.

Abex had a another facility in Alabama, but, despite these causes, employees were told that the problems at Abex were started by ''a labor conflict.''

In a similar vein Riggs also adverted to U.S. Steel's shutdown in nearby Johnstown, stating that this occurred after management attempted, without success, to obtain concessions from the Steelworkers.

It was in this context, that Riggs stated, ''if we're not careful and we don't learn from what's going on here, that it could happen in Somerset.'' He discussed excessive costs affecting the Respondent and the fact that ''we were having a very difficult time being competitive.'' He reminded the men that:

> [M]ost of them had much more to gain by Somerset Welding & Steel plant being there and being a strong company than I did. I had a couple years to work yet. Most of them had twenty . . . to thirty years to work yet. Obviously their employment would generate much more from the company than I was ever going to get out of it.

The employees were told that pay rates were as high as the Respondent could afford. They were reminded that increases had to come from profits, but there were none to divide.

Riggs endeavored to rebut assertions in union literature by explaining the methodology of collective bargaining. Riggs told the employees that the wages and benefits employees presently enjoyed would be subject to negotiation, explaining:

> There is many ways to structure the pay scale in a plant. If you would go to job classifications, everybody that's doing that job got the same rate of pay and we would be in chaos. We were paying all that our business could stand to pay. Our average rate was commensurate with the business around us. . . . including the union plants around us. All of it would have to be laid on the table, all of the fringe benefits, the vacation, the paid holidays, pension plan, the whole thing would have to be laid out. We would have to pick and choose . . . everything would be reviewed, not eliminated, it could be reviewed. They were told that nothing would change until this contract is arranged.

In discussing his anticipation of Steelworkers' bargaining patterns, and the problems they posed for Respondent's operation, Riggs stated that to accommodate these demands, benefits would have to be ''restructured.'' For example, because the Respondent's existing labor cost package was all that it could afford, if more was given in wages, it would have to come from other existing benefits such as pension or hospitalization. As for company strategy at the table, Riggs later expressed the belief that he might have used the words ''bargaining from scratch'' to convey that:

> [Y]ou have to start someplace. Normally in a bargaining situation . . . a person in our position would lay out the lowest figures they could. In this case it would be the minimum wage.

2. Literature

Mailings posted to employees on April 10, 17, and 24 also provide the basis for the General Counsel's contentions in this regard. (GCX–5(a), (b), and (c).)

In the first, dated April 10, the Respondent's stressed its need to remain competitive, while observing that its historic ability to do so, despite great distances from market areas, had created new jobs and good wages. Moreover, the letter noted that competitiveness had enabled the Company to ''get new orders and customers and continue to provide jobs.'' Finally, it opined that the Union would make Respondent less competitive, and that ''all of us have a lot to lose if an outside union like the steelworkers organizes Somerset Welding.'' (GCX–2(A).)

Another mailing, dated April 17, stated:

> [J]ob security means having a job to go to on a regular basis. The Steelworkers do not provide you with a job or pay your wages, the company does. Your job security, therefore, depends upon the company being able to remain competitive and stay in business. We have provided new jobs and good wages while many union companies are closing their doors. We attribute this to our ability to remain competitive.
>
> . . . .
>
> Customers are likely to place orders with a company which provides the best service for the best price. You might ask yourself: ''If I were the customer, would I be likely to give an order to a company where it might be delayed by strikes, arguments, and restrictive work rules, or would I give the order to a company which is free to provide the special attention and consideration which the job might require?''
>
> . . . .
>
> You have a *big* stake in the company continuing to be competitive. Only by being competitive in terms of both quality and price can we get new orders and customers to provide jobs. This is particularly true because we bring a significant amount of work into Somerset County from out-of state. Even with the added costs which are involved when we deal with out-of-state customers, we must still be able to do the work competitively or lose the business. [GCX–2(b).]

By letter dated April 27, the following point was made:

> [T]he presence of the Steelworkers could hurt our business. We could lose jobs because customers might be afraid to give work to a company which could have a strike or labor unrest. [GCX–2(c).]

(3) Concluding analysis

The separate complaints in this proceeding are devoid of allegation that Riggs, during company propaganda in April and May, threatened employees with plant closure or job loss in the event of unionization.[30] Instead, the illegal points im-

[30] The only threat imputed to Riggs appears in the original complaint in this proceeding dated July 10, 1987. (Case 6–CA–19922.) That unsubstantiated allegation does not correspond to the timeframe in which the Company waged its propaganda campaign through mailings and captive speeches. (GCX–1(s).)

puted to Riggs during that timeframe were outlined in Case 6–CA–20034 as limited to the following:

> [T]elling employees that Respondent would reduce employees' wages to minimum wage level and eliminate their benefits and the collective bargaining would start at zero and war would begin if the Union won the election, informed its employees that it would be futile for them to select the Union as their bargaining representative.

The limited nature of this allegation[31] is astonishing when one considers the documentation that must have been available to the General Counsel in framing and administering these somewhat dated complaints, and the relevance of job-loss threats by a high-ranking official to the appropriateness of a remedial bargaining order. That no effort was made to amend the complaints to challenge the published literature on this ground is an act of oversight in a critical area. Nonetheless, under the precedent, since the matter was documented, and no issue of fact exists in connection therewith, Board policy excuses such omissions and requires a finding as if properly alleged.

In *Harrison Steel Castings*, 293 NLRB 1158–1159 (1989), the Board held that, in a context of union hostility, an employer may not lawfully campaign on the basis of surmise that collective bargaining will increase costs, thus, altering the competitive posture of its product in the market place, raising the specter of loss of business and jobs. The oral and written communications by Sidney Riggs obviously fall within that mold. Accordingly, that decision, in light of the other unlawful conduct found herein, including threats of closure and job loss, is dispositive. Indeed, I find that Riggs' totally unsupported assertions[32] concerning reduced competitiveness and concomitant job loss, though not as graphic, gave vent to more direct coercive remarks by supervisors, set forth above. For these reasons, Riggs transcended 8(c) speech guarantees and violated Section 8(a)(1) by associating unionization with a loss of jobs.

The summation of plant closings was also unlawful. First, it is noted that Riggs credibly denied having made any direct statement that the operation would close if the Union were designated. Furthermore, the Board has permitted employers to chronicle the adverse track record compiled by unions, even in the context of other unlawful statements.[33] However, this privilege does not obtain where such citings are offered as a fear-inspiring suggestion of what was likely to occur in the declarant's operation. This was the case here. Riggs admittedly told employees that ''if we're not careful and we don't learn from what's going on here, that it could happen in Somerset.'' This possibility was enhanced by that segment of the campaign rhetoric which cautioned that the Respondent could afford no more than presently paid wages and benefits, a ''stated belief'' uttered by Riggs nakedly and without demonstrable proof that this was so.[34] Employees therefore were left with no objective facts to evaluate. Instead, to avoid closure, those taking Riggs at his word, were impelled by his remarks to reject the Union. He created a bluffing game, raising the ante with duress. Section 8(c) does not privilege the attempt to influence votes in this fashion. The Respondent thereby violated Section 8(a)(1) of the Act.

In the areas specifically challenged by the complaint, employees were not told in so many words that designation of the Union would be futile.[35] Nor does it appear that Riggs ever said that he would decline recognition,[36] that he would refuse to negotiate in good faith,[37] or that he would never execute an agreement.[38] Instead, his message was to the effect that the existing cost of wages and benefits was all that the Company could afford, and therefore bargaining would be constrained to those limits. In other words, employees were led to believe that bargaining would be reduced to a process of restructuring whereby any new benefit would be traded off by elimination or curtailment of an existing one. Concerning this reference, the General Counsel cites no authority denying employers the right to express views as to how fiscal concerns will impact upon the bargaining process. The purpose of any antiunion campaign is to persuade employees that a union is just so much excess baggage and unnecessary. Few such efforts would escape interdict were ''poor mouthing'' equated with a proscribed expression of ''organizational futility.'' The General Counsel offers little guidance as to just how references to cost limitations exceeded that category of propaganda which the law leaves ultimately to the test of collective bargaining, and immediately to employee evaluation, and their good sense. Any assertion that employees were thereby informed that designation of the Union would be futile is deemed insubstantial and any 8(a)(1) allegation based thereon is dismissed.

The final allegation focuses upon statements by Riggs that the Company would adopt a bargaining strategy which would place all existing benefits on the negotiating table, and allow the process to begin from ''scratch'' or ''zero'' or ''the minimum wage.'' Such statements are not automatically condemned by the Board. *Plastronics, Inc*., 233 NLRB 155 (1977). However, they ''violate the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits.'' *Taylor-Dunn Mfg. Co*., 252 NLRB 799 (1980), enfd. 679 F.2d 900 (9th Cir. 1982). On the other hand, no violation is generally found where ''[t]he record is devoid of any evidence of accompanying unfair labor practices which might color an employee's view of the statement.''[39] Here, as shall be seen, the Respondent's effort to defeat the Union was replete with coercive conduct on the part of supervision, including a statement by John Tims Sr.,

[31] The sole allegation that Riggs threatened plant closure places the incident on or about March 20. This period was obviously distinct from the timeframe in which captive meetings were held and written propaganda disseminated. In fact that threat is traced to the original complaint (GCX–1(c)) in this proceeding which issued on May 27, 1987, on the charge filed on March 19, 1987, in Case 6–CA–19922. The incident obviously was unrelated to the Respondent's formal propaganda campaign. I would note, however, that the Respondent in its posthearing brief construes that allegation as focusing on Riggs' subsequent conduct.

[32] Cf. *Benjamin Coal Co*., 294 NLRB 572, 577–582 (1989); *Kawasaki Motors Mfg. Corp*., 280 NLRB 491 (1986).

[33] See *Blue Grass Industries*, 287 NLRB 274 (1987); *Pilliod of Mississippi, Inc*., 275 NLRB 799 (1985).

[34] Cf. *Kawasaki Motors Mfg. Corp*., 280 NLRB 491 (1986).

[35] Cf. *Quality Engineered Products Co*., 267 NLRB 593, 596 (1983).

[36] *Chas. S. Winner, Inc*., 289 NLRB 62 (1988).

[37] *Storer Communications*, 287 NLRB 890 (1987).

[38] *Atlas Microfilming*, 267 NLRB 682, 685–686 (1983).

[39] See, e.g., *Wagner Industrial Products Co*., 170 NLRB 1413 (1968). By opinion dated August 31, 1989, the First Circuit Court of Appeals remanded *Shaw's Supermarkets*, 289 NLRB 844 (1988), to the Board for clarification in the face of an apparent inconsistency with existing precedent. There, however, the remark was not made in the context of other unfair labor practices.

the manager of the Somerset plant, that ''if the union was voted in the company would take away all our benefits.'' This remark gave sinister meaning to Riggs' definition of what would take place at the bargaining table. There were other direct threats by supervisors, but the statement by Plant Manager Tims typifies the ''impression,'' which is viewed by the precedent as the latent danger in the phrase, ''bargaining from scratch.'' *Coach & Equipment Sales Corp*., 228 NLRB 440 (1977); *Belcher Towing Co*., 265 NLRB 1255, 1268 (1982). In this light, the references to zero-based bargaining, in the total circumstances, constituted a further violation of Section 8(a)(1) of the Act.

C. *Discrimination*

1. Denial of wage increases

a. *Carlos Sprankle*

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by, in April, denying Carlos Sprankle a wage increase. Sprankle relates that before his hire, wage rates were of fundamental concern to him. He resided in Johnstown and, prior to his layoff at Bethlehem Steel, had earned as much as $16.50 per hour. When interviewed by Rush, a few days prior to his March 6 starting date, Sprankle expressed concern about Rush's offer of only $5 hourly, but claims that Rush stated that, after 30 days, he would receive a $1 increase, with an additional 50 cents each quarter thereafter ''if everything was going all right.''

Sprankle, after 30 days of employment, did not receive an increase and questioned Guy Rush about it. Rush allegedly explained that he could not give a raise at the time because ''if I give you a dollar an hour raise . . . everybody would think I'm buying votes off of you.'' Rush said that Sprankle's work was fine, but there was nothing he could do. According to Sprankle, Rush added that when ''this'' is settled he might be able to give the raise.

As a general proposition, an employer during the preelection period is required to administer wage increases as if the petition had not been filed. See, e.g., *McCormick Longmeadow Stone Co*., 158 NLRB 1237, 1244 (1967). As a corollary, employers are not entitled to withhold benefits ''as a tactical maneuver designed to discriminate against employees and to interfere with the employees' freedom of choice.'' *Great A & P Tea Co*., 166 NLRB 27, 29 (1967). These are principles which conveniently apply where the increase had been previously announced or identifiable because reasonably coextensive with a clearly defined pattern or past practice. See, e.g., *Arrow Elastic Corp*., 230 NLRB 110, 112–113 (1977). Here, however, the increase in question was available on the basis of an apparently erratic, cyclical evaluation, subject to implementation on the basis of nonobjective, discretionary criteria. *H.S.M. Machine Works*, 284 NLRB 1482, 1490–1491 (1987). At a minimum, if conferred in April, the increase would have been vulnerable as a presumptively unlawful interference with freedom of choice.[40] Such being the case, fairness demands that the Employer be privileged to withhold, provided that it does not utilize the incident as a means of combatting unionization by casting blame for the employee's loss upon the Union, the Board or the election process. *Centre Engineering*, 253 NLRB 419, 421 (1980). In this instance, Rush, at no time, took to the offensive by seeking to make an issue out the denied increase. He merely deflected Sprankle's inquiry by insinuation that any other course might portray the Company in an unfavorable light. No blame was cast upon the Union, the campaign, or the Board, all of which went unmentioned. Finally, his reasoned explanation given to Sprankle, as the law required, was noncommittal as to what would occur after the election. As in *Uarco Inc*., 169 NLRB 1153, 1154 (1968), Rush did not ''shift to the Petitioner the onus for the postponement of adjustment in wages and benefits . . . or . . . disparage and undermine the Petitioner by creating the impression that it stood in the way of . . . planned wage increases and benefits.''[41] Accordingly, and, as no increase had been preordained through either unmistakable promise or fixed cycle, the Respondent, in this instance, did not violate Section 8(a)(3) and (1) of the Act. *H.S.M. Machine Works*, supra.

b. *Thomas A. Deist*

The complaints include a like allegation founded upon a denial, on March 17, of an increase to Thomas Deist.

Deist was hired on November 10, 1986. He relates that during his preemployment interview with Rush, he complained about the offered starting rate of $5.75 per hour, and told Rush he could not afford to work for less than $8 hourly. Rush responded that Deist would have to prove himself, that he would be eligible for a raise after 60 days, and within 6 months Deist could be at his desired wage level.

After hire, Deist was assigned to the Bulow building where he was supervised by Roger Cook. The 60-day period would have expired on January 10, well prior to the advent of union activity. Because he did not receive a raise at that point, he complained to Cook, who later reported back, that he had talked to Rush and that no increase would be given at that time. Thereafter, Deist inquired about a wage increase on a regular weekly basis, and was left with the impression, that management felt he could quit if he did not like his pay status.

Although Deist claims that Rush told him upon hire that the Company had plenty of orders, on January 22, he was laid off. He was recalled on February 19, again before any union activity. However, he avers that on March 13, Cook told him that he had spoken to Rush, who accepted Cook's recommendation that Deist be given a raise. It does not appear that Deist was apprised of any determination of when or how much he could expect.

[40] As shall be seen below, Thomas A. Deist, another alleged discriminatee testified that on hire, he was told by Rush during his interview that he would be eligible for a raise after 60 days. He too did not receive the increase, after this initial cycle expired before any union activity. Deist's testimony confirms a lack of uniformity in the periodic wage evaluation process, and that on a nondiscriminatory basis, increases were withheld even where employees, on hire, were led to believe that they would be forthcoming.

[41] The General Counsel relies on *Gossen Co*., 254 NLRB 339 (1981). As was too often the case, I was not given the benefit of a spot cite. The relevant segment is 254 NLRB at 354. Judge Zankle's critical finding was omitted from the General Counsel's portrayal of that case. Thus, unlike the instant case, the facts disclosed there that: ''Whenever employees were informed . . . that the merit system was being held in abeyance because of the Union's presence, the campaign or union activities were mentioned.''

On March 14, Deist attended the union meeting at the Holiday Inn where he signed an authorization card.

During the ensuing week, he had not received the increase, so on March 18 or 19, Deist again confronted Cook in this regard. According to Deist, Cook stated ''don't get your hopes up, Tom, because you're not getting the raise you were promised.'' Deist, who had not previously informed any management representative that he had attended the union meeting, asked Cook if that were the reason. Cook had no comment.

Cook testified that he was not pleased with Deist's progress and denied that he recommended him for an increase. However, he could not remember, and hence did not deny either that Rush told him he was going to give Deist an increase, or that he told Deist that this would occur. Cook's testimony therefore offers no effective rebuttal, and I credit Deist's testimony that prior to any union activity, he was told that he would get an increase. In these circumstances, the failure to make the promised wage adjustment was contrary to the well-established policy requiring an employer during the preelection period to administer benefits ''as he would if a union were not in the picture.'' *The Gerkin Co*., 279 NLRB 1012 (1986). Having made the commitment prior to the campaign, the Respondent was obligated to follow through during the campaign, a duty not excused either by the temperate fashion in which the withholding is communicated or because unaccompanied by specific union animus. Cf. *H.S.M. Machine Works*, supra. The refusal to grant the increase to Deist violated Section 8(a)(3) and (1) of the Act. See, e.g., *Huttig Sash & Door Co*., 263 NLRB 1256, 1259 (1982).

2. Gary Reiber: his paycheck and layoff

Reiber is the beneficiary of two counts of alleged discrimination. The first concerns a withholding of his paycheck on May 15, and the second pertains to his layoff on May 22.

Concerning the paycheck incident, it will be recalled that the election was conducted on May 15. This was also payday. The official definition of the voting group excluded ''retail sale employees.'' As indicated, prior to his layoff, Reiber worked in the Respondent's retail sales operation which was then located at its Somerset facility. This store-like unit catered to a walk-in trade. Also called the parts department, Clark Emert was its manager. The operation was staffed by five employees; namely, Martha Zerfross, Tom Schrock, John Buratty, Larry Sarver, and Reiber. The latter describes the others as primarily engaged in the sale of parts over the counter to customers. His job, on the other hand, derived from the fact that the Respondent maintained a line of steel, of varying gauges and length, for sale to the consuming public. Reiber was primarily engaged in the cutting and welding of steel according to customer specification as relayed to him by coworkers in the store. He estimates that he spent 70 percent of his time cutting steel, a task performed in the production shop at that location. However, like his coworkers, Reiber's duties also included stocking shelves and waiting on and selling to customers. He participated in commissions earned from these sales.

Reiber's activity on behalf of the Union was confined to his attending a ''couple of . . . meetings'' and his signing an authorization card. There is no direct evidence that management was alert to his sentiment.[42]

On May 15, the day of the election, Reiber asserts that Emert distributed all paychecks but his, retaining it in his shirt pocket. Emert allegedly approached him, asking if Reiber were going to vote. Reiber indicated that he was unsure because he was confused over the issues. Emert then said he could not give him the paycheck unless he knew ''if you're going to vote or not.'' Reiber insisted that he wasn't ''really sure.'' According to Reiber, Emert then went to the office, but returned, advising Reiber that the attorney had informed that Reiber was ineligible to vote. In giving Reiber the check, the latter states that he was told by Emert, ''I better not see you go up there to that voting place.'' Reiber claims that out of concern for his job he decided not to vote.[43]

Emert testified that about 1 week before the election, he learned that his department would be excluded. He at that time told his staff that they would not be eligible to vote in the election. On the day of the election, the Company elected to defer the distribution of paychecks until after employees had voted.[44] Emert, however, obtained checks for his department early because they were not scheduled to vote. He claims that as a joke he asked each one if they were going to vote, and gave them their check after they replied in the negative. He claims that neither Reiber nor any one else in his department took him seriously.

Reiber did not impress me as a reliable witness. His testimony suggests that, as of May 15, he had not been alerted to his ineligibility, and that Emert, also uncertain in that respect, had to check. Emert made more sense. Reiber's name was excluded from the *Excelsior* list prepared by the Employer several weeks prior to the election.[45] Absent evidence that Emert had any basis for suspecting how Reiber would vote, his joking inquiries as to whether ineligible employees had voted, while not to be condoned, were facially absurd, would be taken as ridiculous, and hence offered no foundation for concluding that his antics tended to impede the exercise of Section 7 rights. On the credited facts, it is concluded that Reiber was not subjected to any pressures to refrain from voting, and that his testimony in this respect was a byproduct of his own confusion, rather than what actually oc-

[42] The General Counsel on the knowledge issue states that ''he [Reiber] participated in several discussions concerning the merits of unionization with Emert and other employees.'' Having read, and reread, his testimony, there is no indication that he said anything in such conversations that directly or by implication would disclose his position.

[43] The complaints include no allegation embracing this direction not to vote which, bracketed with the threatening language, would amount to a blatant violation of Sec. 8(a)(1).

[44] This procedure is left unchallenged by the General Counsel. Its use was confirmed by at least one of the latter's witnesses. Thus, Joseph Sharbaugh, an employee at the Trailer division, testified that on the afternoon of the election, as he and Mike Pritts were waiting for their paychecks, Dwight Clyde asked if they had voted. When they said they had not they were told they would not receive their checks until they did. They voted and then were given their paychecks.

[45] (GCX–4.) The General Counsel argues, somewhat circuitously, that Reiber was not told of his ineligibility ''because he was eligible,'' and that Emert knew it. This assertion is absolutely baseless. First, the *Excelsior* list, which would have been forwarded to the Union well prior to the election, offers objective evidence that the Employer did not consider him eligible. Also groundless is the General Counsel's suggestion that the retail and parts departments were separate and distinct. This stab at the literal is rebuffed by the record's plain indication that these terms were used interchangeably to describe the store. In any event, I believed Emert's testimony that his employees, including Reiber, were informed well in advance of the election as to their ineligibility.

curred. All 8(a)(3) and (1) allegations pertaining to this incident shall be dismissed.

On May 22, Reiber was laid off. He claims that Emert at that time approached him, stating:

> I was told to . . . lay you off because of lack of work, and there would be some people that's going to be put down to part-time work. And the union may be coming in . . . and it was just disrupted there.

On cross-examination, Reiber admitted that, during investigatory stages, he had informed the Board that Emert specifically stated that the layoff had nothing to do with the Union.

At the time, Reiber had been assigned to the store about 7 or 8 years. He was never criticized nor disciplined regarding his work. He enjoyed greater length of service than certain coworkers in the store, namely, Martha Zerfross, Danny Schrock, and Kent May. No one else in the department had performed his steelcutting duties. After he left, these orders were performed in the shop by production personnel.

Emert testified that prior to the layoff, the ''parts department'' was a full service operation, with customers being waited on at a sales counter by department personnel. According to Sidney Riggs, this proved unprofitable, and in seeking ways to cut costs, it was decided to convert to a self-service operation. Emert described the layoff as a cost-cutting measure that took place contemporaneous with the conversion to self-service. He testified that he and Bill Riggs, his superior, selected Reiber, not because his duties were dispensable, but because, in the main, he served as a laborer and could not understand the service reference books. Emert also noted that Reiber's cutting work was originally performed in the production shop. During a production slowdown, a position was created in his department for Reiber, hence his work was readily transferrable back from whence it came. Reiber's dispensability was also foreshadowed by his preference against Saturday work, and his propensity to take off days on an unscheduled basis, without prior authorization, and without calling in.[46]

In agreement with the Respondent, it is concluded that the General Counsel has failed to substantiate its initial burden that union activity was a motivating factor in this layoff. It is true that Reiber had signed an authorization card and that the Respondent was antiunion. However, for the reasons stated, there is no direct evidence, nor basis for inferring, that the Respondent was aware of his sentiment, or for that matter, interested. As an ineligible employee, with no overt role in the campaign, it was highly unlikely that Reiber offered a fitting subject for postelection reprisal. The circumstances do not go so far as to even arouse suspicion. Accordingly, it is concluded that the General Counsel has failed to furnish a reasonable basis for inferring that union activity played any contributing role in Reiber's selection. Were I to find otherwise, based upon the credible explanation of Emert, I would conclude that Reiber would have been laid off even if he had not engaged in union activity. The 8(a)(3) and (1) allegations in this respect are dismissed.

[46] Emert's uncontradicted testimony is to the effect that he twice precluded Reiber from participating in group commissions because of his absenteeism.

3. The layoff of Carlos Sprankle

Sprankle had been employed for slightly less than 3 months when laid off on June 1. The General Counsel contends that this was discriminatory and violative of Section 8(a)(3) and (1) of the Act.

Prior to his layoff, Sprankle signed an authorization card, encouraged coworkers to do so, wore a union button to captive meetings in which Sidney Riggs delivered his antiunion messages, placed stickers on a storage box in his work area, and had argued the pros and cons of unionization with Baughman. He avers that he had never been disciplined, and that on several occasions Foreman Baughman and Rush told him that his work was good.

Sprankle states that he was told that his layoff was because work was ''slowing down.'' If actually conveyed, this explanation would have been indefensible. First, Sprankle's uncontradicted testimony establishes that, at the time, his job required overtime, and that two other welders had quit, and were recently replaced by new hires. The ongoing viability of that job was confirmed by the testimony of Charles Knotter, a coworker, who related, without challenge, that he was removed from his work for 2 weeks after Sprankle's layoff to perform the latter's job. Knotter adds that he returned to his former position, after the Respondent hired a replacement, Mike Dieter. Knotter relates that it was he who trained Dieter.

On the other hand, contrary to Sprankle, Rush, with support from Baughman, testified that Sprankle was laid off because ''his work habits had been faltering, slowing down and the quality of his work was decreasing rapidly.'' I was inclined to believe them essentially because of corroboration by Cary Mishler, an active proponent of the Union, who earlier had been a major witness for the General Counsel. The latter testified that after Sprankle was denied a wage increase, he engaged in a deliberate slow down, which produced repeated warnings, but which forced Mishler to conclude that Sprankle ''wouldn't do his job.'' In the light of this entirely believable testimony, it is concluded that the Respondent has established that Sprankle would have been terminated even had he not engaged in activity protected by the Act. The 8(a)(3) allegation in this respect shall be dismissed.

4. Randy Keyser: changes in working conditions

It is alleged that on various dates in June and July, the Respondent discriminated against Keyser by (1) restricting his access to the parts room, (2) transferring him from the Trailer building to the Bulow building, (3) reducing his hours, and (4) denying him overtime.

Keyser was an active proponent of the Union. He was a member of the organizing committee formed at the March 14 union meeting, and in that capacity successfully solicited coworker signatures to authorization cards, having executed his own. He demonstrated his support by wearing union insignia on his person, hat, and lunchpail. He also testified in support of the Union during the postelection hearing on challenges held on June 9 and 10.

It will be recalled that shortly before the election, one of his supervisors, Berkley, allegedly told Keyser that he was among the union protagonists who ''probably won't have jobs after its over.'' A similar threat was confirmed by Mark Taylor who states that Berkley told him that certain people,

including Randy Keyser, were more or less to blame for the Union and that ''actions would be taken against them to make sure that . . . the union didn't come through.''

At the time of the election, Keyser earned $7.25 hourly, while assigned to highly specialized military trailers being fabricated under the Peabody-Gallion contract. He was stationed at the end of the line, responsible for checking and testing the installation of all hydraulics. He did some finishing work, and a small amount of fabrication. He also installed the front doors. According to Keyser, no one else performed his job, because the trailers demanded knowledge beyond the skills and experience of other finishers.

After Keyser testified at the postelection hearing on June 9, he took a brief vacation, returning to work on Monday, June 15. At that time, Supervisor Rod Berkley told Keyser that he would no longer be permitted to go to the parts room to get parts, a trip of more than 300 feet that Keyser claims to have been making 15 to 20 times daily. Keyser was instructed to page Berkley when a part was required, and to make a list inventorying every part requested of Berkley, who later would deliver the parts. No explanation was offered to Keyser for these changes. He testified that he was unaware of any one else who was similarly restricted.

Concerning parts procedure, Berkley acknowledged that in June, he reaffirmed a previously adopted routine to be followed by employees when they needed parts. No longer could they go to the parts room, but parts would be ordered through supervision, then delivered to the immediate work area either by supervisors or employees designated as ''parts people.'' According to Berkley, though adopted in 1985, enforcement of this policy was lax until June. Berkley also testified that all were required to list the parts used, to facilitate costing out the process. In addition, hydraulic work requires large quantities of parts, and when a particular unit, new to production, is completed, this listing enables accumulation of parts at the workstation when the next trailer is ready for production.

Rush confirmed that the policy was in effect, but not closely enforced or posted until June 1987. It applied to everyone. The timing of this action was attributed by Rush to his learning that the parts policy had been abused only after hearing Keyser's testimony in the representation hearing. Before this, Rush claims that he was unaware that Keyser was making 20 trips to the parts room daily. Supervision was therefore instructed to enforce the preexisting policy. Rush confirmed that an element of this policy required the employees to list items needed. This is done either at the beginning or end of the shift. Rush described this requirement as designed to facilitate parts delivery to the workstation, and to prevent disruptions to production sustained when technicians themselves secured their parts.

Contrary to the General Counsel the parts policy, even if new, did not strike as in the nature of reprisal. Instead, this was sound management policy which, while serving interests of efficiency, would reduce the burden on mechanics. After all, Keyser himself admitted that previously his ventures to the parts room were so frequent that he was ''back and forth all the time.'' There can be no question, that Keyser's strong support of the Union was known. Moreover, specific animus toward him made him a fitting candidate for reprisal. However, the record does not persuade that enforcement of the parts distribution and inventory rules were part of any such design. Nor is that view altered by the fact that the flawed production practice was discovered through employee testimony during a representation hearing. On balance, it is my judgment that, once discovered, corrective steps would have been taken even had there been no union activity.[47] The 8(a)(3) and (1) allegations based thereon shall be dismissed.

It is also alleged that Keyser was victimized by a discriminatory transfer. Thus, on or about July 10, the work on the military trailers was completed. That afternoon at the end of his shift, Keyser was informed by Dwight Clyde that he would be transferred to the Bulow building, effective the following Monday. Clyde explained that there was a large quantity of hydraulic work to be performed at that location. Keyser discussed the transfer with Guy Rush, who justified it by a backup in hydraulic work at Bulow.

Keyser relates that the trailer operation started working a 10-hour day and Saturdays a ''couple days before this.'' For this reason, Keyser states that he asked Rush about overtime at Bulow, prompting the latter to check by telephone, and then report to Keyser that Bulow was then working 9-hour days. Keyser agreed reluctantly to take the transfer,[48] but asked Rush if they were trying to get rid of him or trying to lay him off. Rush asked if Keyser was volunteering for a layoff, to which Keyser responded in the negative, but asked if he could get one if he wished. Rush said they could probably work something out.

According to coworker Mark Taylor, Keyser was replaced on the hydraulic work at the Trailer plant by Jack Updyke and Clyde Smith.

When Keyser reported to Bulow, he found only five employees working there. He reported to Roger Cook, a supervisor with whom he had no problems, and who complimented his work. There was no hydraulic work. Instead, he engaged in basic fabrication, including welding, bolting, drilling, and fitting.[49] With this transfer there admittedly was no cut in pay rate or benefits. In fact, Keyser characterized this work as ''simpler.''

The rub was overtime. Keyser claims that during his 4-week tenure at Bulow,[50] the Trailer division had averaged 10 hours daily, plus Saturday work. In contrast, his overtime at Bulow was cut during the first week, to 9-hour days, with no Saturday work, and the second week, after 2 or 3 days, to 8 hours daily. Although Keyser's estimate of hours worked by the Trailer department was overstated, a signifi-

[47] Not one Trailer department employee, other than Keyser, was called to confirm that he had not been informed of this policy. Although Keyser testified that he did not know of anyone else subject to this restriction, testimony which is facially unreliable, this absence of corroboration enforces its rejection. I credit the testimony of Rush and Berkley that the policy applied to everyone. The General Counsel argues that Keyser was restricted as ''simply a step along the path to Respondent's ultimate goal of isolating Keyser from other employees, so as to curtail his knowledge of Respondent's operations as well as to minimize his influence on other Unit employees.'' While within the realm of possibility, such a motivation is not inferable on this record.

[48] Notwithstanding this testimony, the transfer is not construed as an offer, which was subject to Keyser's approval. Admittedly this possibility is raised by Keyser's testimony that, ''I told him [Rush] I didn't want to go in there, but I would.'' However, there is no contention on Respondent's part, nor did Rush testify that Keyser was free to decline the transfer and remain employed. In this light, I am convinced that all involved understood that the transfer was mandatory.

[49] In the course of his testimony, Keyser appeared to admit that he performed ''plumbing'' work at Bulow which was ''basically the same'' as hydraulic work.

[50] On August 7, Keyser voluntarily took a job at a higher rate of pay.

cant discrepancy in overtime opportunities is suggested by payroll records pertaining to the period June 21 through August 16. (See RX–6.)[51]

In this light, the evidence demonstrates a detrimental transfer of a known union protagonist within the period when objections were pending. Considering the specific animus directed toward Keyser during the campaign, the circumstances, under *Wright Line*, 251 NLRB 1083 (1980), sufficed to impel the Respondent to refute the inference that union activity was ''a'' motivating factor. In this instance, the Respondent suffered a failure of proof. Prior to the transfer, Keyser had worked continuously in the Trailer department since its opening in September 1985. Guy Rush explained that Keyser was transferred because he was shorthanded on a job in Bulow that had fallen behind schedule while not progressing to the customer's satisfaction.[52] That job entailed 24 units, all requiring plumbing on a tank and sprayer unit. Capable help was needed, and because Keyser had just completed a plumbing job in the trailer department and because of his quality workmanship, Rush states that he picked Keyser. However, Rush admitted that a scheduled delivery date was also in jeopardy at the Trailer plant, hence requiring dreaded overtime at that location. His explanation leaves open the question as to why this key employee, to his personal prejudice, was removed from one, time-critical job and placed on another. At the same time, there is no denial of Mark Taylor's testimony that two men replaced Keyser at the Trailer plant, with both assigned considerable overtime in that process.[53] Although the issue is not free from doubt, Keyser's unprecedented removal from the Trailer department, with the concomitant loss of overtime, under these circumstances, is deemed unaccompanied by convincing explanation. I am not persuaded that this would have occurred were he not among those blamed for union activity. The Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. The refusal to reinstate John Tims Jr.

As indicated, John Tims Jr. and Bob Lee were the first employees to meet directly with union representatives and sign authorization cards. The contact took place on March 7. Tims' prounion bent was complicated by the fact that his father, John Tims Sr., at times material, is, and has been, the superintendent at the Respondent's Somerset plant. Tims Sr.'s reaction is evident from findings set forth above concerning his coercive conduct the night before his son would serve as the union observer at the May 15 election.

During the campaign, Tims Jr., due to an injury sustained while playing volley ball, was on disability leave. On February 12, he underwent reconstructive knee surgery. When injured, Tims, an employee with over 10 years' service, earned $9.75 hourly. While out of work, his income was $125 per week.

The General Counsel contends that, following Tims' recovery, the Respondent violated Section 8(a)(3) and (1) of the Act by failing to ''recall'' him since May 16.

In this connection, it appears that, on April 24, Dr. Hill, his physician, released him for sedentary to light duty effective April 27. (See GCX–6(a).) Tims took the release to Rush, who, as indicated, questioned him concerning the union campaign. Tims, who was still on crutches at the time, and needed work, told Rush he was hurting financially, but agreed that it probably would be best to wait a while longer.

Within the next 2 weeks, Tims discarded his crutches. However, he had been fitted with a large brace to restrict the flex in his knee. A medical slip dated May 14, over Dr. Hill's signature, authorized a return to ''regular'' duties. (RX–3(a).)

Tims, this time, applied to Larry Garman, the director of safety for Riggs Industries.[54] Garman, having observed the large brace worn by Tims and his significant limp, was not certain that he was completely healed. He therefore arranged that very afternoon for a further evaluation by the orthopedic staff at East Hills Rehabilitation Institute. It was anticipated that the examination would be followed by immediate submission of a work report.

Tims, on May 15, was examined at East Hills by a Dr. Yardley. He was next referred to the Fitness Institute for ''work simulated'' testing. This entailed a variety of motion exercises designed to replicate work positions encountered by Tims on the job. At the conclusion, Dr. Yardley advised Tims a report would be submitted to Garman.

Garman avers that he telephoned East Hills at about 4 p.m., on May 15, and discussed the case with Mike Arnall as well as an unidentified occupational therapist. Garman claims that he was told that the work simulation test, which normally runs from 2 to 4 hours was limited to 1 hour because Tims had to leave apparently to complete his duties as union observer in the election of that same day. Also his strength testing did not proceed beyond a 10-pound range. Garman was given preliminary information that the knee had limited flex, but that Tims was a determined individual, and for that reason the prognosis was good.

That evening, according to Garman, he, without success, attempted to reach Tims by telephone. On May 16, Tims called Garman, who was not available. Sidney Riggs answered the phone.[55] Tims identified himself, telling Riggs that he wished to return to work. Riggs angrily told Tims, ''to crawl back to the hole in the ground,'' then hung up.

The next communication between Garman and Tims was on May 16 or 17. Thus, Garman related that, based upon the information he had informally received on May 15, questions existed which were inconsistent with an immediate return to work, and which would block reinstatement until resolved. He hoped answers would be provided in East Hills' written

[51] Uncontradicted testimony demonstrates that Keyser was replaced in the Trailer department by John Updyke and Clyde Smith. During the relevant timeframe, Updyke worked 195 hours and Smith worked 200 hours. According to Keyser's estimates, he worked only 168 hours at Bulow.

[52] Contrary to the General Counsel, I did not disbelieve testimony by Roger Cook and Rush that more manpower was needed at Bulow. Apart from possible increased overtime, the transfer apparently did not have any adverse effects in the Trailer operation. Moreover, it was not shown to have created a surplus of labor at Bulow.

[53] Both jobs were pursuant to fixed price contracts. Under the arrangement, overtime would eat into profits and was to be avoided. For reasons not entirely clear to me, the Respondent was less inclined to sustain these costs in connection with the time-critical job at Bulow.

[54] Apparently Somerset Welding & Steel, Inc. is a subsidiary of Riggs Industries. Garman's conduct in connection with this allegation is clearly binding upon the Respondent. Decisions as to the timing of reinstatement, or whether it will be conferred or denied to employees on disability leave, are within his exclusive domain. Either on agency or supervisory grounds, he was Respondent's instrumentality for passing on requests of the type registered by Tims and under scrutiny here.

[55] Garman confirms that he was later informed of Tims' attempt to reach him that morning.

report. Consistent therewith, Tims asserted that he telephoned Garman, and that he was simply told that, as yet, Garman had not heard from Dr. Yardley, and presumably would not act until that information was available. Thereafter, Tims claimed to have continued to call Garner on a weekly basis receiving the same response.

Garman explained that East Hills failed to respond in timely fashion, but stated that he followed up regularly with no immediate success. Eventually, on June 3, two documents arrived, consisting of Dr. Yardley's report dated May 15, and a memo to Dr. Yardley dated May 18 from the Fitness Institute. (RX–3(b).) He stated that it was not until Friday, June 5, that he reviewed them in detail.

Garman was dissatisfied with the reports. He viewed them as too limited in defining specific tasks within the objective evaluation of Tims' work capacity. His strongest reservations focus on Dr. Yardley's summation, as follows:

> This man is interested in returning to work. I have certain doubts about his abilities, but he states that he will be able to do his work and I therefore support his decision. I do think that further physiotherapy is mandatory and I am hopeful that he will be able to regain his full range of knee motion specifically extension. . . . This man's work involves standing and sitting and does not involve a lot of lifting of weights. He is a welder and he is able to do his job with not a lot of heavy activity and I therefore think it is reasonable for him to return to work at this time. [GCX–6(b).]

Garman construed this as tantamount to suggesting that Tims be restored on a trial basis. He testified that he would not act on this basis, but required information creating ''the greatest degree of likelihood that [Tims] . . . could successfully perform the work. . . .'' He mentions several factors in the report that undercut that possibility, including Dr. Yardley's references to loss of extension, the need for continued physiotherapy, Dr. Yardley's own doubts about Tims' abilities, and the misimpression that Tims' job did not involve ''a lot of heavy activity.'' Garman therefore decided that until these reservations were clarified, he would not permit Tims to return to work.

Garman testified that, having made up his mind to defer his approval, he discussed this with Tims,[56] and then scheduled him for completion of the work simulation testing and followup evaluation. According to Garman, this was tentatively scheduled for June 14 or 15, but did not actually take place until June 23.[57]

In the interim, apparently on June 17, Dr. Hill released Tims for return to work without restrictions. (GCX–6(c).) The release was taken to Garman who remained unconvinced, apparently preferring to defer action until East Hills forwarded their findings.

Garman testified that he obtained the final round of reports by driving to East Hills on or about June 29 and picking them up himself. After a detailed review the following day, Garman decided to restore Tims because of positive results on the ''task by task'' objective evaluation. He informed Riggs of his recommendation on or about July 1, and after acceptance, Guy Rush was instructed to make arrangements for Tims' return.[58] The latter actually reported for work on July 6.

The 8(a)(3) allegation is limited to a refusal on or about May 16, and thereafter to employ Tims. There can be no question that considerable resentment was harbored toward Tims, whose prounion bent not only was a family embarrassment, but who underscored his indifference to his father's position, and the Company's will by acting as the Union's observer during the May 15 election. Considering the threats addressed to him and the hostile rebuff by Sidney Riggs, one might readily infer that Respondent held firmly to the belief that he was owed no favors, and that any adverse action was caused at least in part by his strong union support. To this extent, the burden was upon the Respondent to demonstrate that the younger Tims would have received the same treatment even if he had not engaged in protected activity.

I am persuaded that the Respondent rightfully refused to reinstate Tims when he appeared under heavy movable cast and with significant limp on May 15. Garman explained credibly that this judgment was in furtherance of his responsibility to ''limit the exposure we have as to any injuries as well as prevent accidents in the first place.'' Thus, this injury was nonoccupational and noncompensable, and Garman did not want to have Tims return ''under any circumstances where . . . he would further aggravate the non-occupational injury, have it turn into an occupational injury.'' Were this to occur, the Respondent would have been liable for all medical care, as well as any subsequent disability, whether partial or permanent. In contrast, as Garman further explained, occupational injuries justified the Company in taking greater risks. (See GCX–10.) In those cases, reinstatement on a light-duty basis serves to reduce ongoing benefit costs, while imposing little risk of additional liability.

The General Counsel would rebut this explanation by pointing to the cases of Richard Hildebrand and Gooden. Like Tims, both were welders on leave due to nonoccupational injuries, yet both returned to work without undergoing work simulation testing. (See GCX–11 and 12.) Garman concedes that this was so but distinguishes Tims' case. According to Garman, Hildebrand and Gooden applied with unrestricted medical clearances, but, unlike Tims, in their cases, ''there was no physical indications that they could not ambulate normally, be about and do their job.'' This explanation was unchallenged and seemed an entirely logical basis for diverse action. It was believed. Based upon the testimony of Garman, which I believed in its entirety, it is concluded that Tims, on and after May 16, was denied reinstatement until cleared by occupational testing, a requirement imposed in the interest of legitimate business objectives which would have been pursued even in the absence of union

[56] Tims testified that it was not until June 11, after intervention by his wife, that he received a copy of Dr. Yardley's report. Thereafter, for unexplained reasons, he delayed a week before contacting Garman. According to Tims, in that conversation, Garman claimed initially that he still had not received Dr. Yardley's report, but then, Garman located the document. However, Garman told him that Dr. Yardley had not established to his satisfaction that Tims was ready to come back to work.

[57] On this occasion, to avoid misunderstanding as to the physical demands of Tims' job, a videotape of his working conditions was submitted to East Hills for use in connection with their evaluation.

[58] On June 4, an unfair labor practice charge in Case 6–CA–20034 was amended to allege that Tims had been unlawfully terminated, and on July 1, once more amended to allege that he had been unlawfully denied reinstatement. (GCX 1(o) and (q).)

activity.[59] The 8(a)(3) and (1) allegations in this regard shall be dismissed.

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Many of the Union's objections to the election are coextensive with unfair labor practice allegations in the various complaints. No evidence was adduced concerning Objections 1, 3, and 8. Furthermore, for the reasons stated above, Objections 6, 7, 9, 10, and 11 have been deemed nonmeritorious. Accordingly, Objections 1, 3, 6, 7, 8, 9, 10, and 11 are hereby overruled. However, by virtue of the above unfair labor practice findings, Objection 2 (threats of plant closing), Objection 4 (threatened loss of benefits), and Objection 5 (threatened reduced wases) have been substantiated as having occurred during the critical period after the petition was filed. The coercive pattern of conduct depicted in those objections was wased at the highest echelons of management. Moreover, the illegal remarks of Sidney Riggs, through published materials and captive speeches, would have reached each and every employee in the voting group. See, e.g., *Caron International, Inc*., 246 NLRB 1120 (1979). Accordingly, Objections 2, 4, and 5 are hereby sustained, and based on the Employer's preelection misconduct described therein, the election conducted on May 15, 1987, is hereby set aside.

V. THE REMEDY

A. *The Refusal to Bargain*

1. The Union's request

There is no dispute that on March 17 the Union submitted an unmistakable demand for recognition, which, as evident in the Respondent's entire course of conduct thereafter, was rejected.

2. The appropriate unit

The parties agree that the appropriate unit herein consists of the following:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Somerset plant, Trailer plant and Bulow building facilities in Somerset County, Pennsylvania, excluding all employees of Lincoln Supply and Equipment Company's Central Trailer farm and family Center, retail sale employees, salesmen, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

3. The Union's majority

Duly authenticated, signed authorization cards were received in evidence which demonstrated that of the 142 employees in the unit on the day of the election, 30 had designated the Union by March 14.[60] This total was supplemented by 5 as of March 15; 39, by March 16;[61] and 1, by March 17, when the Union formally sought recognition. Thereafter, 7 more cards were executed on various dates before April 15, for a grand total of 82.[62]

Based on the foregoing, it is concluded that the Union held valid, unambiguous designations from a majority of unit employees when, on March 17, it demanded recognition.[63]

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[59] No other theory of a violation was mentioned by the General Counsel either before, during, or after the hearing. The focal point of the allegation was that reinstatement was denied. The only delay challenged was that occasioned by the occupational testing interposed by Garman. Suspicion generated by deferrals caused by considerations other than simulated testing are viewed as collateral and neither alleged, argued, nor fully litigated.

[60] This group includes the authorization card purporting to bear the signature of Sidney Conway. (GCX–183(a).) His card was received upon the basis of signature comparison with a W-2 held in the Respondent's records bearing his signature. Conway was actively employed at the time of the hearing, but he was not called to dispute the authenticity of his signature. In light of the similarity of the samplings, it is concluded that this card constitutes a valid designation which contributes to the Union's majority. See, e.g., *Aero Corp*., 149 NLRB 1283, 1287 (1964). The Respondent contests eight cards solicited by Cary Mishler and [sic] alleged supervisor. (GCX–111–118.) In this respect, the Respondent argues that these cards were tainted because Mishler from time to time would stand in for Mel Baughman, the supervisor of the body line. The cards were properly authenticated and the burden was upon the Respondent to defeat them. It has not done so. Mishler's concern for his own organization activity is no substitute for proof that he was legally bound to abstain. The record does not establish how often Baughman was replaced, whether sporadic or regular, nor does it define the authority possessed by Mishler on those occasions. Indeed, neither Mishler, nor Baughman were examined in this regard. The entire issue struck as afterthought and these eight cards are counted as valid union designations. Finally, the Respondent contests the card of Dave Stanton (GCX–165) as not properly authenticated. This, in fact, was accomplished through testimony of card solicitor Franklin McVicker. The Respondent urges that McVicker be discredited because he departed from practice in failing to initial this card and in fact the card bears the cipher employed by another solicitor, Randy Keyser. Nonetheless, McVicker impressed me as definite and truthful in conviction that he witnessed the execution of the card and I believed his testimony, noting that the explanation he affords for the failure to initial is entirely possible. The card is counted.

[61] This figure excludes the card of Glen Hoover (GCX–173). His card was solicited by Don Sanner. According to the uncontradicted testimony of Hoover he was told at the time that ''if I didn't sign it . . . whenever the union come in . . . I'd loose [sic] all my seniority, someone else could walk in off the street and have my job.'' The card, signed under duress, is rejected.

[62] The status of Gary Reiber is contested, with the General Counsel arguing that he should be included. There is no merit in this view. Although Reiber performed 70 percent of his work in a production area, and often utilized skills common to production, his duties were neither integrated with nor related to the production function. His alignment with unit employees ends with these nonwork-related contacts. Basically his work in the shop was in furtherance of a specialized service offered by the Respondent to the consuming public in support of retail sales. He was supervised in common with sales personnel, was regularly called upon to wait upon trade and to stock shelves, and shared in sales commissions. I find that he was a retail sales employee, within the exclusion set forth in the agreed-upon unit. Accordingly, his authorization card has been disregarded.

[63] Although he is illiterate, the card of Merle Foust, dated April 6, was fully authenticated by James Brant and is counted as a valid designation. The same result is reached in the case of David Brown, who admits to signing the card, but denies that he read it, and asserts that he understood this was a step necessary to obtain more information. This attempt, through subjective state of mind testimony, to extricate oneself from the legal effects of the designation, was not only insubstantial as a matter of law (*NLRB v. Gissel Packing Co*., supra, 395 U.S. at 608), but also incredible. Similarly, Sanford Pletcher, who claims that he signed the card thinking it was joke, offered no substantial basis for repudiating his admitted execution of this single-purpose designation. Finally, three additional cards were solicited by employee Brad Barclay. He admittedly asked Joe Cabinaw, Edward Emrick, and David Hoover to sign, advising that they read the card and that the purpose of the card was to have an election. Subsequently, Hoover testified that before signing he read it, was told that its purpose was to organize, but could recall no other representations concerning the card. I find the cards to be valid designations. In doing so, it is noted that in response to a misfired, highly suggestive question by the General Counsel, Barclay in effect acknowledged that he told the men that the ''only purpose of the card was to get an election.'' However, in weighing this colloquy against the balance of his narrative testimony, I did not believe that specific statements were made inconsistent with the purpose stated on the card, as required in *Cumberland Shoe*, 144 NLRB 1268 (1963), as approved by the Supreme Court in *NLRB v. Gissel Packing Co*., supra at 606–609.

4. The propriety of a bargaining order

Contrary to the General Counsel, the proven unfair labor practices were not so ''outrageous and pervasive'' to warrant a *Gissel I* category bargaining order. On the other hand, *Gissel II* relief is warranted where lesser offenses are

> so substantial in character that the possibility of erasing the effects of these unfair labor practices and conducting a fair rerun election by the use of traditional remedies is slight and . . . sentiment regarding representation, having been expressed through authorization cards would, on balance, be better protected by issuance of a bargaining order, than by traditional remedies alone.

The instant record manifests illegal conduct in the form of coercive interrogation, threats of plant closure, loss of jobs, and reduced wases and benefits. In addition, the Respondent discriminated against an employee by denying a wase increase, and later, following the election, against another by a prejudicial transfer.

Central to the *Gissel* issue, however, are the threatening remarks made during the preelection period by Sidney Riggs, the chairman of board, a principal owner and presumably the founder of the business; Guy Rush, its vice president; John Tims Sr., the manager of the main plant; Dwight Clyde, the manager of the Trailer plant; and front-line supervisors, including Roger Pyle and Rod Berkley. Of these, the less sophisticated, direct threats occurred in face-to-face confrontations between a supervisor and one or two employees. However, these coercive remarks often amounted to no more than a simplification of the arguments communicated to the entire work force on several occasions by Sidney Riggs. In all likelihood they were inspired by Riggs' unsubstantiated premise that designation of the Union would reduce the competitive posture of the Company, resulting in a loss of business and jobs. His exclamation that ''the Steelworkers could hurt our business'' was complemented by the promise of a negotiating scheme that would produce no new benefits, with the Company opening negotiations from a scratch or zero-based position, even to the point of insisting that wases be dropped to the minimum required by law.

Riggs' strategy of fear was addressed to a work force softened by reminders that other unionized plants in the immediate area had been closed in recent years. Some had actually lost jobs in those very plants. Few others would have been untouched by this experience which had thrown friends and relatives out of work. Against this background, the illicit references to a curtailment of jobs and employment opportunities would have indelible meaning to anyone with employment ties to this region. In short, Riggs unveiled a campaign message, fanned by others within supervision, whereby employees would associate unionization with plant closure and loss of jobs and benefits, thereby producing an insoluble atmosphere of fear likely to outlive compliance with the Board's traditional remedies. In this light, the threats involved here were even more devastating than those in *J. Coty Messenger Service*, 272 NLRB 268, 269 (1984), where a panel majority (Members Zimmerman and Hunter, with Chairman Dotson dissenting) stated:

> It has long been established that the threat of loss of employment, discharge of union adherents, and the threat of plant closure, all of which occurred here, are likely to have a lasting inhibitive effect on a significant portion of the work force, destroying election conditions, and therefore are ''hallmark'' violations, supporting the issuance of a bargaining order absent significant mitigating circumstances.

On this record, including the implication that the threats made by low level supervisors were largely inspired by the illicit conduct of Sidney Riggs, I find that the cards signed by a majority of the unit employees on and before March 17 furnishes a more reliable indicia of employee choice than might be possible through a future election held under protection of conventional remedies. Accordingly, it is concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing on and after March 17 to recognize and bargaining with the Union.

VI. GENERAL REMEDIAL PROVISIONS

Having found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily denied overtime to Randy Keyser and a promised wase increase to Thomas Deist, each of whose employment terminated on nondiscriminatory grounds, shall make them whole for their earnings lost in consequence thereof. Backpay shall be included with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent independently violated Section 8(a)(1) of the Act by threatening employees with plant closure, loss of jobs, discharge, and other unspecified reprisals because they have engaged in union activity.

4. The Respondent independently violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their own and the union activity of coworkers.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by denying a promised wase increase and by transferring an employee so as to produce a loss of overtime and reduced earnings because they had engaged in union activity.

6. Since March 17, 1989, the Union has been the exclusive agent, representing a majority, within the meaning of Section 9(a) of the Act, of employees in the appropriate unit, as follows:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Somerset plant, Trailer plant and Bulow building facilities in Somerset County, Pennsylvania, excluding all employees of Lincoln Supply and Equipment Company's Central Trailer farm and family Center, retail sale employees, salesmen, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

7. By virtue of the unfair labor practices described in paragraphs 3, 4, and 5 above, the Respondent has undermined the Union's majority and has precluded any likelihood that a fair election could be held in the future.

8. The Respondent has violated Section 8(a)(5) and (1) of the Act since March 17, 1989, by refusing to recognize and bargain with the Union in the above-defined collective-bargaining unit.

9. The unfair labor practices found above constitute unfair labor practices having an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[64]

ORDER

The Respondent, Somerset Welding & Steel, Inc., Somerset, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their own or the union activity of coworkers.

(b) Threatening employees with discharge or other reprisals for engaging in union activity.

(c) Threatening loss of jobs, wases, and benefits, or plant closure in the event of unionization.

(d) Discouraging employees from engaging in union activity, by denying wase increases or overtime, or in any other manner discriminating with respect to their wases, hours, or terms and conditions and tenure of employment.

(e) Refusing, on request, to recognize and bargain in good faith with the United Steelworkers of America, AFL–CIO–CLC, as the exclusive collective-bargaining representative of its employees in the appropriate unit defined below:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Somerset plant, Trailer plant and Bulow building facilities in Somerset County, Pennsylvania, excluding all employees of Lincoln Supply and Equipment Company's Central Trailer farm and family Center, retail sale employees, salesmen, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the above unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Make whole Thomas Deist and Randy Keyser for earnings lost by reason of the discrimination against them, with interest, as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Somerset, Pennsylvania, copies of the attached notice marked ''Appendix.''[65] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[64] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[65] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX B

Note: This discussion of testimony by 21 current and former employees was originally intended to be a part of this decision. It has been exacted from the text, because, while of utility as a reference source, the testimony of these witnesses has been deemed unsuitable as a basis for reconstructing the argumentation made by Sidney Riggs during the captive speeches.

1. Cary Mishler Jr. testified that he attended a meeting in which Sidney Riggs stated that:

> [I]f we would get the union to come into our shop, he could no longer be competitive . . . with the other body companies . . . they'd loose [sic] business over it.

2. Kenneth Miller recalled Riggs stating:

> [A]t this point in . . . history it would be a bad idea if we go with the . . . steelworkers. . . . [T]he way the economy and stuff is he's doing the best he can for us, . . . he don't think the Steelworkers would help us at all and . . . why would we want somebody to sit in offices and tell us what to do . . . when our work is involved.
>
> . . .[t]he Steelworkers would do us more harm than what it would good.

3. Kenneth Mishler added that in response to a question whether benefits would be lost, Riggs stated ''that we could lose them and everything would be negotiated from [that] . . . point.'' Riggs allegedly said ''wases would probably be lowered to about minimum wase and everything negotiated from that point.''

4. David Faidley testified that he heard Riggs state:

> [If the] union comes in you got to start from zero, you got to start from scratch and you got to bargain for everything you get, you don't get anything without bargaining. You raise wases, you got to cut benefits be-

> cause you can't get money from where there is none . . . strikes ruin or cripple a company.

Faidley asserts that Riggs specifically stated, with respect to a firm called ''Abex,'' that ''the union ruined the company to the point that it had to close its doors.'' He also quotes Riggs as saying,

> [w]e have to remain competitive and therefore . . . if you get a raise, raises have to come from somewhere . . . we have to raise the price of the body and when you raise the price of the body we become noncompetitive, and therefore there is no money for raises.
>
> . . . .
>
> [W]hen the union comes in you start from zero. . . .

Faidley admits that he does nor recall Riggs ever stating that he would close the plant if the Union comes in, though he left Faidley with that opinion. In fact Faidley confirms that Riggs did not describe any specific consequences that would occur if the plant was unionized.

5. James Brand testified that Sidney Riggs mentioned ''bargaining from scratch,'' in response to a specific inquiry from coworker Don Zerfross, by stating, ''yes, definitely, we would have to start from zero.'' According to Brand, Riggs added that unions had outlived their usefulness, were not interested in helping the working man, and actually had closed many shops. Although Riggs apparently did not state that the instant plant or plants would be closed upon unionization, Brand testified that ''somehow, I got the impression that they was also going to close our shop.'' Riggs did make the argument that the Union would restrict the Company's ability to do business with customers who seek dependable production without threat of strike, and who might even cancel orders in the event of a work stoppage.

6. David Gerhard testified that Riggs stated that the election was just ''a battle'' and if the Union comes in the a ''war'' would just begin, adding that ''in negotiations—we would have to start at three dollars and thirty-five cents, an hour or . . . we'd lose everything we already have.'' Gerhard avers that Riggs denied the plant would be closed in the event of unionization, but did state that he ''didn't want anybody else telling him what to do . . . .''

7. Carl Nickleson testified that during the three or four meetings he attended, Riggs said that if they had to negotiate they would ''start from scratch again, probably minimum wase, lose all benefits and have to negotiate from there with everything all over again.'' Nickleson claims that Riggs said that he didn't want outsiders coming in to run his company, he wouldn't stand for it, and if the Union got in ''he would do something about it.'' Riggs allegedly said that there was no law that required him to stay open if the Union came in. In his prehearing affidavit, Nickleson averred that he ''never heard anything that I recall to the effect that Sidney would close the plant if the union got in . . . .''

8. Bradley Barclay, a former employee at the Somerset plant, who confessed that the meetings were a long time ago, stated that he could recall the first meeting where Riggs was ''upset'' and stated that the Company ''has never been union and it will not be union as long as I own it.'' He allegedly used the steel and coal industries as exemplifying higher wases and prices unionized operations which rose to a level which put everybody out of a job. Although Barclay first stated that Riggs stated that the resulting shutdowns were because of the union, this link was later described as made by Riggs in these terms: ''He said, do you see what the unions did for the steel mills and the coal mines.'' Barclay also acknowledged that some of his own employees had worked at the closed facilities and ''if they did not like the way things were run at Somerset Welding & Steel, that they could seek employment elsewhere.''

9. Randy Keyser testified to comments by Sidney Riggs at the Trailer plant. He avers that the latter spoke of the impact of unionization upon customers, pointing out that Peabody-Gallion's business had been acquired when its Oklahoma trailer plant was shutdown due to labor relations problems. Riggs assertedly added that Pullman Standard, having acquired Peabody-Gallion, and other customers as well, might prefer to remove work if it learned that the Respondent was having labor problems, rather than experience delays in shipments should they materialize. At another level, Riggs allegedly explained that the Respondent had taken on unprofitable work, just to keep its men working. Finally, according to Keyser, Riggs said that, if the Union should be designated, no law required its recognition, and he could just go out of business. In his pretrial affidavit dated April 2, 1987, Keyser stated that Sidney Riggs did not threaten to close the plant or move it, but did state that ''there was no law to stay in business if the union came in.''

10. Richard Keyser, Randy's brother, who was also employed at the Trailer plant testified that Riggs used a local foundry Abex as an example, observing that the latter was union, had taken large wase cuts, and still had shut down. Riggs added that if the Union were voted in, negotiations would start with all benefits at ''zero.''

11. Another employee at the Trailer plant, Robert Gursky, testified that Riggs told the men that ''the union caused companies to close.'' He mentioned Abex as a one that the union had closed, also mentioning coal companies in that same vein. He said that if the Union came in, wases and benefits would go back to zero and then be renegotiated from there.

12. Mark Taylor, who admittedly could not recall the precise words used, also testified to remarks made by Sidney Riggs at the Trailer plant. He claims that Riggs said the Union would not be in the best interests of the Company: it would drive wases up, force him to raise prices, and the Respondent would not be competitive. He enforced this argument by reference to the lower wases and overhead costs in the South. He stated that if they went on strike they could lose their jobs, and that benefits currently enjoyed would have to be renegotiated, and there was no guarantee that employees would have as much after negotiations as they did before.

13. Charles Knotter attended the captive meetings at the Somerset plant. Concerning the Abex references, he first, in response to plodding examination by the General Counsel, related that Riggs said that Abex had shut down ''[b]ecause they went union.'' When asked by me for the exact words used by Riggs, he responded differently:

> He just said that we better look at the Abex plant . . . the plants around [that were shut down] that were union.

The General Counsel did not retreat. Following an opportunity to examine his prehearing affidavit, Knotter described Riggs as saying:

> [W]e should take a look at Abex and other surrounding plants, they were union involved, the union was there and they were shutdown.

These later versions are subject to a quite distinct result when addressed from the standpoint of privileged argumentation under Section 8(c).

Knotter also testified that Riggs stated that ''if the union got in we'd have to negotiate, start from minimum wase and negotiate for . . . all our benefits.''

14. Nick Emerick, a former employee at the Somerset plant, recalled that Riggs made the following points in these meetings:

> 1. If Union got in, the Respondent would no longer be competitive.
>
> 2. It would be a cold day in hell when the Union got in.[20–30 employees present.]
>
> 3. He was doing a community service by providing jobs, and the men should be happy to be working.
>
> 4. He referred to someone as a ''mole'' who was drawing salaries from both the Company and the Union and who was described as lower than a scab. [Tims Jr.]
>
> 5. He mentioned several operations where employees ''worked theirselves out of jobs being Union,'' adding that a lot of former union members are now employed by the Respondent.

15. Tom Feist was assigned to the Bulow building. He believed that only one antiunion meeting was held at that facility. He admits that he had difficulty recalling what Sidney Riggs said, but did recall him saying that he thought the employees were receiving fair wases and benefits, and that the Union if designated could not guarantee more, because Riggs would be the judge of ''how much money is to be made in that industry.''

16. Lewis Ewing claims that he attended four of these meetings. He alleges that at the first, Riggs stated, ''he really didn't need the company because he already made his money . . . He could just shut the doors and walk away from it.'' According to Lewis, Riggs at these meetings also stated that if the Union came in, any increased wases would hurt his ability to compete, and that all benefits would have to be renegotiated, that he could promise nothing, as negotiations would start from zero.

17. Gary Reiber testified that Sidney Riggs made the following points:

> [T]hings were sort of slow, and as time would go on there would be some pay increases and stuff. That as far as the union was concerned, that they could break it down, and that a lot places went out of business because the union was in. And if things got better that they would try to come along with a little more money across the line. And if things got to the point where the union would come in, that they might have to do a lot of transferring around or close up.

18. Carlos Sprankle testified that he heard Sidney Riggs state, within ear shot of approximately 30 employees in attendance, that ''if he found out who started this shit he'd get rid of them right now.'' Riggs on another occasion mentioned that he had hired a lot of men from Bethlehem Steel who had been laid off from their union jobs, an example for the employees to consider.

19. John Wegrzyniak testified that at the meetings he attended in the Trailer plant, Riggs stated that the Union was unneeded, dues would be turned over to the New York Mafia, that the Union would cause strikes all the time, and that the Respondent would have to raise prices harming its competitiveness. He also mentioned that U.S. Steel and Abex had shut down plants in the Johnstown area ''because the union wanted too much money from them.''

20. Richard E. Miller summarized what he heard at the Trailer plant as follows:

> He said something about if the union would come in we probably wouldn't have . . . near work that we have at this time and we might have to have more layoffs in order . . . to keep up. . . . [A]lso he brought [out] that we had good benefits and maybe if a union would come in that we wouldn't have as good as benefits as we had before. . . . [H]e said probably we'd have to maybe lower the benefits to get . . . the raises, something like that. [Miller's prehearing affidavit made no mention of lowering benefits, but did state that Riggs said, ''in order to get raises they'd have to raise prices and they'd get less jobs.'']

21. Robert G. Lee describes Riggs as saying that it took a lot of blood, sweat, and tears to build the Company, and ''if the union comes in we'd have to drop our wases down to the minimum wase . . . [a]nd then if that didn't work, he'd just forget about the whole thing. . . .'' Lee states that this was ''pretty much'' Riggs' exact words.

22. Joseph Sharbaugh, a witness who was hardly friendly to the Respondent in other areas, testified to a different perspective. Thus, he related that at the Trailer plant, Riggs did not threaten or imply that the plant would close.